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No. _____-_____

IN THE

Supreme Court of the United States

NEW YORK,

Petitioner,

- versus -

AZIM HALL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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JUNE 13, 2008

QUESTIONS PRESENTED

1. Does the Fourth Amendment permit the police to conduct warrantless strip and visual body cavity searches incident to arrest, for the purpose of finding and preserving concealed evidence of the crime?

2. In *Schmerber v. California*, 384 U.S. 757 (1966), this Court ruled that the Fourth Amendment prohibited warrantless "intrusions into the human body" absent a "clear indication" that evidence would be recovered and exigent circumstances justifying the warrantless search. Here, after arresting respondent for the felony sale of narcotics, police ordered him to remove his clothes and bend over for a visual inspection of his anus. When he did so, the officers noticed a string protruding from his rectum. The police pulled this string, which was attached to a bag of crack cocaine secreted inside that cavity. However, the police never touched, probed, or entered into respondent's rectum in any way. Did this search and seizure constitute an intrusion into the body requiring a warrant under *Schmerber*?

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In The
SUPREME COURT OF THE UNITED STATES

NEW YORK,

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-versus-

AZIM HALL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

The State of New York respectfully petitions for a writ of *certiorari* to the New York Court of Appeals in *People v. Azim Hall*, 10 N.Y.3d 303, 886 N.E.2d 162 (N.Y. 2008).

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 10 N.Y.3d 303, 886 N.E.2d 162 (N.Y. 2008), and is reproduced in the appendix at pages 1a-37a. The opinion of the New York Appellate Division, First Department, is reported at 39 A.D.3d 100, 829 N.Y.S.2d 85 (N.Y. App. Div. 2007), and is reproduced in the appendix at pages 38a-47a. The written order of the trial court (New York Supreme Court, County of New York) granting respondent's motion to suppress is unreported and is reproduced in the appendix at pages 48a-53a.

STATEMENT OF JURISDICTION

On March 25, 2008, the New York Court of Appeals reversed the order of the Appellate Division, First Department, granted respondent's Fourth Amendment motion to suppress physical evidence, and dismissed the indictment (App. 1a).[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part, that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause .. "

STATEMENT OF THE CASE

This case presents two important issues of Fourth Amendment jurisprudence both concerning the power to conduct a search incident to arrest, that have sharply divided the courts of this nation.

First, although this Court determined in *United States* v. *Robinson*, 414 U.S. 218, 234 (1973), and *United States v. Edwards*, 415 U.S. 800, 802-03 (1974), that a full warrantless search of a person is permitted incident to any lawful arrest, this Court

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[1] Page references preceded by "App." are to petitioner's separately-bound appendix.

has expressly reserved the question of whether a strip search or visual body cavity search of an arrestee is also permissible. *See Illinois v. Lafayette*, 462 U.S. 640, 646 n.2 (1983). This case presents that issue, thereby giving this Court an opportunity to resolve a federal constitutional question that has resulted in a deep split amongst both the federal courts of appeals and the states.

Second, in the context of a 1966 case involving the drawing of blood from an arrestee by means of a needle inserted into the arrestee's arm, this Court determined that the Fourth Amendment forbids warrantless "intrusions into the human body" absent a clear indication that evidence would be found and exigent circumstances that justify dispensing with the warrant requirement. *Schmerber v. California*, 384 U.S. 757, 769-70 (1966). In the more than forty years since *Schmerber*, courts nationwide have struggled to define what constitutes an "intrusion" into the body. In particular, courts have sharply split over whether the removal of an object partially protruding from a body orifice constitutes an intrusion into the body requiring a warrant. In this case, the New York Court of Appeals ruled that by pulling a string protruding from respondent's rectum the police conducted an unlawful intrusion into his body. This case will allow this Court to clarify what constitutes an intrusion into the body under *Schmerber*, thereby resolving a second issue that has split both federal and state courts.

A. Material Facts

On the evening of February 10, 2005, two Manhattan police officers, who were stationed on a rooftop in a neighborhood plagued with drug dealing, clandestinely watched respondent and Ross Meyers sell drugs outside a neighborhood bodega (App. 2a, 39a, 48a). Specifically, two men approached Meyers and handed him money (App. 2a, 39a, 49a). Meyers accepted the money and talked briefly with respondent (App. 2a, 39a, 49a). Then, he and respondent went inside the bodega (App. 2a, 39a, 49a). Respondent retreated to the back of the bodega, while Meyers remained by the entrance (App. 2a, 39a, 49a). Minutes later, respondent emerged from the back and handed something to Meyers (App. 2a, 39a, 49a). Meyers, in turn, went outside and gave "small white objects" to the waiting men (App. 2a-3a, 39a, 49a).

Upon seeing the apparent drug sale, the police left their rooftop perch to arrest the participants; the buyers escaped, but the police arrested respondent and Meyers (App. 3a, 39a, 49a). In a "pat-down" search at the crime scene, no contraband was recovered (App. 3a). Respondent and Meyers were brought to the precinct station house, where the arrest was processed (App. 3a, 49a). There, respondent was given a more thorough pat-down search; still, no contraband was recovered (App. 49a). However, the police knew that drug dealers, particularly in the area in which respondent had been arrested, often secreted narcotics between their buttocks or down their pants (App. 14a, 39a). In fact, in "at least one out of two drug arrests, the

suspects had hidden drugs in such a manner" (App. 14a, 39a-40a).

For this reason, respondent was led into a holding cell and ordered to disrobe (App. 3a, 40a, 49a). Now standing naked inside the cell, respondent was asked to bend over for a visual inspection (App. 3a, 40a, 49a). When he did so, the police noticed a three-inch long white string protruding from his rectum (App. 40a, 49a). The police believed that this string was attached to narcotics (App. 3a, 49a). The police ordered respondent to remove the string, but he refused (App. 3a, 32a, 40a, 49a). One police officer then secured respondent while another pulled the string (App. 3a, 32a, 40a, 49a-50a). The string, which was tied to a plastic bag containing crack cocaine, came out easily; no police officer "put a hand or implement" into respondent or "even touched him below the waist," and respondent was in no way injured (App. 3a, 32a, 49a-50a). Respondent was subsequently charged with two New York narcotics felonies (App. 3a).

B. Proceedings Below.

Prior to trial, respondent moved to suppress the bag of crack cocaine that had been recovered by the police, arguing that the police conducted an unlawful body cavity search by pulling the string protruding from his rectum (App. 50a). The suppression court agreed with respondent, granted his suppression motion, and dismissed the indictment (App. 53a). Characterizing the search as a "body cavity search," the suppression court

determined that under *Schmerber v. California*, 384 U.S. 757 (1966), and *People v. More*, 97 N.Y.2d 209 (N.Y. 2002), which applied *Schmerber* to a body cavity search conducted at the suspect's apartment, the Fourth Amendment required a warrant to conduct a visual inspection of respondent's anus and likewise to pull the protruding string, unless "exigent circumstances" justified dispensing with the warrant (App. 50a-51a). The suppression court concluded that the lack of exigent circumstances here "dictate[d]" that the "body cavity search" was "unreasonable" (App. 51a).

A unanimous five-judge panel of the New York Appellate Division, First Department reversed the suppression order and reinstated the indictment, ruling that the search at the precinct was not "unreasonable" under the Fourth Amendment (App. 38a). The intermediate appellate court noted that *Schmerber* required a search warrant for police "intrusions *within* the suspect's body" (App. 40a-41a) (emphasis in original). The Appellate Division ruled that "pull[ing] the string out of [his] rectum" did not constitute an intrusion into respondent's body (App. 41a-42a).

Instead, the police conduct at the precinct amounted to a "strip search" and "visual body cavity" search governed by the "reasonableness" principles pronounced by this Court in *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), which considered the constitutionality of warrantless visual body cavity searches of pretrial detainees housed in a correctional facility (App. 41a-42a). The reasonableness balancing test promulgated in *Bell*

considered "(1) the scope of the intrusion, (2) the manner in which the search is conducted, (3) the justification for initiating the search, and (4) the place in which the search is conducted" (App. 42a) (*citing Bell*, 441 U.S. at 559). And as the Appellate Division explained, in balancing those factors and taking into account the legitimate security interests of correctional facilities, this Court ruled that warrantless visual body cavity searches of prison detainees were permissible "even absent probable cause, particularized suspicion or clear indication" that evidence would be found (App. 42a-43a) (*citing Bell*, 441 U.S. at 560).

The Appellate Division recognized that the *Bell* rule pertained to pretrial detainees, and that this Court had "not yet specifically considered the circumstances under which a strip search incident to arrest [was] justified" (App. 42a) (*citing Illinois v. Lafayette*, 462 U.S. 640, 646 n.2 [1983]). However, citing a number of cases from the Second Circuit Court of Appeals, the court determined that such warrantless visual searches were lawful where there exists a "reasonable suspicion that the arrestee is concealing" contraband (App. 43a) (*citing Weber v. Dell*, 804 F.2d 796, 802 [2d Cir. 1986]).

Applying the four-factor *Bell* test to the facts at hand, the Appellate Division held that the "visual body cavity search initially conducted here was justified and reasonable" (App. 46a). Even though the "scope" and "nature" of the procedure was "degrading," the "manner and place" of the search were "reasonable" and the "visual body cavity search" was justified by "the facts known to the

police, including their experiences with the common practices of drug sellers in the neighborhood," and their "observation of defendant selling drugs, packaged in small packets, during which the seller had to temporarily retreat to an unseen spot prior to completing the transaction in order to retrieve the goods he sold" (App. 46a). Indeed, those factors gave the police "reasonable suspicion" to believe that respondent was "concealing ... contraband" (App. 46a). Lastly, the "observation of the protruding string during the course of the procedure justified the immediate actions taken to physically retrieve the secreted narcotics" (App. 47a).

On federal constitutional grounds, the New York Court of Appeals reversed the Appellate Division's decision (App. 11a, 15a). Initially, five of the seven judges held that the "relevant constitutional precedent" required the "reasonable suspicion standard" for investigatory strip searches and visual body cavity inspections incident to arrest (App. 11a). Under this standard, the police could conduct a strip search if they had reasonable suspicion that an arrestee was "concealing evidence underneath clothing," and they could conduct a "visual body [cavity] inspection" if they had a "reasonable suspicion that the arrestee has evidence concealed inside a body cavity" (App. 1a, 7a-8a, 11a).[2] Under that legal standard, the majority

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[2] The Court of Appeals pronounced that there were "three distinct and increasingly intrusive types of bodily examinations undertaken" incident to arrest (App. 4a). A strip search is one in which the arrestee disrobes, a visual body cavity search is one in which the police visually inspect the

(Continued...)

concluded that the police here had the requisite "reasonable suspicion" to conduct the initial strip and visual body cavity search (App. 13a).

The two judges in the minority on that score agreed that the "reasonable suspicion" standard should apply to strip searches incident to arrest, but opined that a higher standard of cause should be adopted for "visual body cavity searches" (App. 16a). They concluded that like manual body cavity searches, a visual body cavity search was an intrusion into the body that either required a warrant "based upon probable cause" or "satisfaction" of the *Schmerber* clear indication and exigent circumstances test (App. 16a, 21a) (*citing Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1449 [9th Cir. 1991]; *Hughes v. Commonwealth*, 31 Va. App. 447, 460 [Va. Ct. App. 2000]).

However, the Court of Appeals decided, by a vote of four to three, that *Schmerber* "dictate[d] that a more stringent standard be applied to a physical search of an arrestee's body cavity" (App. 10a). In that regard, the Court of Appeals believed that *Schmerber* obliged the police to obtain a warrant "before conducting a body cavity search" like the one here, even though no "insertion into the body cavity [was] necessary" (App. 12a). The four judges

(...Continued)
arrestee's "anal or genital cavities," and a "manual body cavity search" includes some "degree of touching or probing of a body cavity that causes a physical intrusion beyond the body's surface" (App. 4a) (*citing Blackburn v. Snow*, 771 F.2d 556, n.3 [1st Cir. 1985]).

concluded that, "when the police physically removed the object that was attached to the string without first obtaining a warrant, they conducted an unreasonable manual body cavity search in violation of the Fourth Amendment" (App. 15a).

The dissent wrote that the general rule allowed the police to search an arrestee without a warrant. The exception to that rule established in *Schmerber v. California* required a warrant only for "searches that intrude into the human body" (App. 32a-33a). Here, the dissent noted, *Schmerber* was "inapplicable" because "no one intruded into" respondent's body or caused him pain; the "removal of the contraband in this case seem[ed] ... a lesser violation of privacy than the lawful search that led to its discovery" (App. 33a). Hence, the dissent concluded, it made "little sense ... to require officers to obtain a warrant in cases such as this, where contraband is visible between the cheeks of the buttocks and may be retrieved easily, without harm to the individual" (App. 36a) (*quoting State v. Barnes*, 215 Ariz. 279, 285 [2007] [Espinosa, J. dissenting]).

REASONS FOR GRANTING THE WRIT

1. AS THE SPLINTERED DECISION OF THE NEW YORK COURT OF APPEALS QUITE FAIRLY INDICATES, WHETHER THE FOURTH AMENDMENT PERMITS WARRANTLESS STRIP AND VISUAL BODY CAVITY SEARCHES OF ARRESTEES TO

RECOVER EVIDENCE OF A CRIME IS A DIFFICULT AND IMPORTANT QUESTION THAT REQUIRES RESOLUTION BY THIS COURT.

A. Twenty-Five Years Ago, This Court Left Unresolved The Question Of Whether The Fourth Amendment Permits Warrantless Strip And Visual Body Cavity Searches Incident To Arrest.

"Reasonableness" is the "ultimate touchstone of the Fourth Amendment," *Brigham City, Utah* v. *Stuart*, 547 U.S. 398, 403 (2006), and it is well-settled that a warrantless search of a person incident to any lawful arrest is reasonable. *United States v. Robinson*, 414 U.S. 218, 234-35 (1973); *see also United States v. Edwards*, 415 U.S. 800, 802-03 (1974). Such a search is justified both by the need to detect weapons and other dangerous items, and by the need to "search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Chimel v. California*, 395 U.S. 752, 755 (1969); *see also Knowles v. Iowa*, 525 U.S. 113, 116 (1997); *Robinson*, 414 U.S. at 234.

Immediately after this Court decided *Robinson* and *Edwards*, some courts ruled that strip and visual body cavity searches incident to arrest could be conducted without a warrant and without any particularized individual suspicion at all. *See, e.g., United States v. Klein*, 522 F.2d 296, 300 (1st Cir. 1975); *State v. Magness*, 115 Ariz. 317 (Ariz. Ct. App. 1977). And here, the contested evidence was not lawfully recovered unless the strip and visual body cavity search which followed the arrest was

legal. However, this Court later explicitly reserved the question of whether such searches were authorized by *Robinson* and its progeny (App. 7a, 21a, 42a). *See Illinois v. Lafayette*, 462 U.S. 640, 646 n.2 (1983) (Court had not yet addressed the "circumstances in which a strip search of an arrestee may or may not be reasonable").

Thus, whether the search incident to arrest contemplated in *Robinson* and *Edwards* includes strip and visual body cavity searches of arrestees remains an open question. *See, e.g., Amaechi v. West*, 237 F.3d 356, 361 (4th Cir. 2001) (in deciding reasonableness of body cavity search, wrote that *Robinson* did not permit all searches incident to arrest, "no matter how invasive"); *Swain v. Spinney*, 117 F.3d 1, 6 (1st Cir. 1997) (under *Robinson* not all "searches of an arrestee's body are automatically permissible as a search incident to arrest"); *Giles v. Ackerman*, 746 F.2d 614, 616 (9th Cir. 1984) (*Robinson* inapplicable to visual body cavity searches); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1271 (7th Cir. 1983) (*Robinson* "did not contemplate the significantly greater intrusions that occur[ ]" in a visual body cavity inspection).

While *Illinois v. Lafayette* reserved the question, this does not mean that this Court has provided no guidance on this subject. In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court considered the constitutionality of a blanket policy requiring visual body cavity searches of all pre-trial detainees subsequent to visitations with persons from outside the prison. Acknowledging that the Fourth Amendment prohibited "unreasonable" searches,

this Court wrote that "reasonableness" required a "balancing of the need for the particular search against the invasion of personal rights that the search entails." *Id.* at 559. The Court ruled that the detention center's security interests outweighed the intrusion of a visual body cavity search, and therefore, such searches could be conducted "even absent probable cause, particularized suspicion or clear indication" that evidence would be found. *Id.* In doing so, this Court promulgated a four-factor "reasonableness" test, balancing the 1) scope of the intrusion, 2) the manner in which the search is conducted, 3) the justification for initiating the search, and 4) the place in which the search is conducted. *Id.* at 559-60.[3]

B. State and Federal Courts Are Divided Over Whether the Fourth Amendment Permits Warrantless Investigatory Strip and Visual Body Cavity Searches Incident to Arrest.

As noted, the two primary justifications for a post-arrest warrantless search at the stationhouse are to maintain institutional security and to discover concealed evidence of the crime. *Knowles*, 525 U.S. at 116; *Robinson*, 414 U.S. at 234-35. *Bell*, which permitted warrantless visual body cavity searches of pretrial detainees, was decided in the context of

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[3] In his partial dissent, Justice Powell recommended that visual body cavity searches of detainees be subject to a "reasonable suspicion" standard (*Bell*, 441 U.S. at 563), thereby foreshowing, if not actually precipitating, the New York Court of Appeals' application of such a rule in this case.

institutional security concerns, as its subjects were not in the category of the newly arrested who will often be in possession of fruits or evidence of the recently committed crimes.

While *Bell* permitted warrantless visual body cavity searches of pretrial detainees, a "ruling applicable to incarcerated jail inmates is not automatically applicable to those newly arrested" (App. 42a). *See, e.g., Turner v. Safley*, 482 U.S. 78, 89 (1987) (constitutional standards in prisons different because even prison regulations that "impinge[ ] on inmates' constitutional rights" are valid if they are "reasonably related to legitimate penological interests"). And since *Bell*, federal and state courts throughout the nation have struggled to determine whether, and in what circumstances, the Fourth Amendment permits warrantless strip and visual body cavity searches incident to arrest. *See, e.g.*, Gabriel Helmer, *Strip Search and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U.L. Rev. 239, 242 (2001) ("*Bell* test has provided minimal guidance to lower courts, and these courts continuously struggle to extrapolate" what is demanded for strip and visual body cavity searches of arrestees and detainees) [hereinafter Helmer, *Strip Search and the Felony Detainee*].

In considering situations analogous to *Bell*, where institutional security was the paramount reason for the strip or visual body cavity search of the detainee, many courts have resolved *Illinois v. Lafayette*'s undecided question in line with Justice Powell's partial dissent, *see* footnote 3, *supra*, and have concluded that strip and visual body cavity

searches of lawfully arrested suspects, when done to maintain institutional or jail security, are lawful when the police have a "reasonable suspicion" that the arrestee is concealing contraband or weapons inside his body. *See, e.g., Archuleta v. Wagner*, 523 F.3d 1278, 1284-85 (10th Cir. 2008); *United States v. Barnes*, 506 F.3d 58, 62 (1st Cir. 2007); *Campbell v. Miller*, 499 F.3d 711, 718 (7th Cir. 2007); *Evans v. Stephens*, 407 F.3d 1272, 1279 (11th Cir. 2005); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989); *Watt v. Richardson Police Dep't*, 849 F.2d 195, 198 (5th Cir. 1988); *Jones v. Edwards*, 770 F.2d 739, 740-41 (8th Cir. 1985); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986); *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984). A number of states have likewise adopted the "reasonable suspicion" standard in this context. *See, e.g., Paulino v. Maryland*, 399 Md. 341, 356-57 (Md. 2007); *State v. Jenkins*, 82 Conn. App. 111, 123 (Conn. 2004); *Taylor v. State*, 239 Ga. App. 858 (Ga. Ct. App. 1999); *Delaware v. Doleman*, 1995 Del Super. LEXIS 235, *22 n.2 (Del. Super. Ct. 1995) (unpublished decision).

But in considering situations like the one presented here, where the arrestee was subjected to a strip and visual body cavity search just to prevent the concealment and potential destruction of evidence, the federal and state courts have sharply splintered. Broadly speaking, and as will be explained, *infra*, the courts have largely devolved into two opposing camps -- those that permit warrantless visual body cavity searches of arrestees to discover evidence and those that do not. Yet strikingly, even within the federal circuits and states that have permitted warrantless investigatory strip

and visual body cavity searches, the legal standards and given rationale for conducting such searches vary considerably.

In that regard, some courts, in permitting warrantless strip and visual body cavity searches of arrestees to search for evidence, have simply analyzed the propriety of such searches under *Bell*'s four-part reasonableness test, looking at the scope of the intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *See, e.g., United States v. Williams*, 477 F.3d 974, 977 (8th Cir. 2007) (investigatory strip search incident to arrest in precinct parking lot reasonable); *United States v. Cofield*, 391 F.3d 334, 336-38 (1st Cir. 2004) (stationhouse strip search of defendant, who was arrested for possession of heroin, reasonable); *Justice v. Peachtree City*, 961 F.2d 188, 192-93 (11th Cir. 1992) (strip search of arrestee at stationhouse proper under *Bell*); *McGee v. State*, 105 S.W.3d 609, 616 (Tex. Crim. App. 2003) (visual cavity search of defendant at fire station, after arrest for selling drugs, reasonable under *Bell*).

Similarly, courts have employed the *Bell* test and determined that the scope or manner of a given search rendered it inherently unreasonable. *See, e.g., Amaechi*, 237 F.3d at 361-63 (strip search in public, which involved penetration of arrestee's vagina, unreasonable under *Bell* "scope of intrusion" and "location" factors); *United States v. Ford*, 232 F. Supp. 2d 625, 630 (E.D. Va. 2002) (search of defendant's buttocks on side of highway unreasonable under *Bell* location factor); *Paulino v.*

Maryland, 399 Md. 341, 355 (Md. 2007) (visual cavity search of arrestee at carwash unreasonable under *Bell* "location" factor).[4]

Yet to avoid the inherent difficulties and lack of uniformity that come with applying a multi-prong test, many of the state and federal circuit courts that have permitted warrantless strip and visual body cavity searches of arrestees to recover evidence, have eschewed the *Bell* test and endeavored to provide a more objective standard as to the reasonableness of conducting such searches. *See, e.g., Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1273 (7th Cir. 1983) ("reasonableness" standard requires "that the facts upon which an intrusion is based be capable of measurement against an objective standard"); Nadine Strossen, *The Fourth Amendment in the Balance*, 63 N.Y.U.L. Rev. 1173, 1184 (1988) (Fourth Amendment balancing tests problematic because they are "inherently subjective," and "no objective methodology exists for their implementation").

In doing so, the highest court of Massachusetts, while not requiring a warrant, has adopted the "probable cause" standard for visual body cavity searches of arrestees, regardless of whether the search is conducted for security purposes as in *Bell* or, like here, to recover secreted evidence of the crime. *See Commonwealth v.*

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[4] The intermediate appellate court here applied the four-factor *Bell* test and found that under the circumstances, the "visual body cavity search" was "justified and reasonable" (App. 45a-46a).

Thomas, 429 Mass. 403, 408-09 (1999). However, the majority of jurisdictions, including the First, Seventh, Eighth, Tenth and Eleventh Circuits and the state courts of Maryland, Delaware, Connecticut, and now New York, have embraced the lesser "reasonable suspicion" standard. *See, e.g., Archuleta*, 523 F.3d at 1284-85; *Campbell*, 499 F.3d at 717-18; *Richmond v. City of Brooklyn*, 490 F.3d 1002, 1008-10 (8th Cir. 2007); *Evans*, 407 F.3d at 1279;[5] *Swain*, 117 F.3d at 7; *Hall*, 10 N.Y.3d at 303; *Jenkins*, 82 Conn. App. at 125; *Nieves*, 383 Md. at 573; *Doleman*, 1995 Del Super. LEXIS 235 at *22 n.2; *see also Sarnicola v. County of Westchester*, 229 F. Supp. 2d 259, 268-70 (S.D.N.Y. 2002) (investigatory visual body cavity search justified by "reasonable suspicion"); *Harden v. Flowers*, 2003 U.S. Dist. Lexis 7213 (N.D. Ill. 2003) (unpublished decision) (same); *Liston v. Steffes*, 300 F. Supp. 2d 742, 757 (D. Wis. 2002) (same).

And even though the aforementioned courts have agreed on the "reasonable suspicion" standard, they have split as to why this standard is required. The Tenth and Eleventh Circuits, along with the state courts of Maryland and Delaware, have simply held that the Fourth Amendment "reasonableness" mandate requires the police to have "reasonable suspicion" before conducting a strip and visual body

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[5] In *Evans*, the Eleventh Circuit ruled that while the police must have "at least" reasonable suspicion to conduct investigatory visual body cavity searches incident to arrest, it cautioned that perhaps the "actual standard" was "higher." 407 F.3d at 1279

cavity search of an arrestee to find evidence of a crime. *Archuleta*, 523 F.3d at 1284-85 (*citing Foote v. Spiegel*, 118 F.3d 1416, 1425-26 [10th Cir. 1997]); *Evans*, 407 F.3d at 1279; *Nieves*, 383 Md. at 573; *Doleman*, 1995 Del Super. LEXIS 235 at *22 n.2. Conversely, the First, Seventh, and Eighth Circuits, and the state courts of Connecticut and now New York, have analyzed the propriety of such searches under *Bell*, and from *Bell*, have concluded that "reasonable suspicion" is required.[6] *Campbell*, 499 F.3d at 717-18; *Richmond*, 490 F.3d at 1008-10; *Swain*, 117 F.3d at 7; *Hall*, 10 N.Y.3d at 303; *Jenkins*, 82 Conn. App. at 125.

Hence, among the jurisdictions that permit warrantless visual body cavity searches of arrestees to recover evidence, there is significant confusion as to which legal standard applies. In fact, even within individual circuits, different legal standards have been employed. For example, in recent decisions, the First, Eighth, and Eleventh Circuits, like the intermediate appellate court here (App. 45a-46a), have analyzed strip and visual body cavity searches of arrestees under both the "reasonable suspicion" standard (*Swain*, 117 F.3d at 7, *Richmond*, 490 F.3d at 1008-10, *Evans*, 407 F.3d at 1279), and the four-factor *Bell* test (*Cofield*, 391 F.3d at 336-38, *Williams*, 477 F.3d at 977, *Peachtree City*, 961 F.2d

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[6] The five judges writing for the majority here (App. 2a), as well as every justice on the intermediate appellate court (App. 47a), found that the police had "reasonable suspicion" to conduct the strip and visual body cavity search of respondent (App. 14a, 46a).

at 192-93). Similarly, in Texas, that state's highest court for criminal appeals, while agreeing that the visual body cavity search of the arrestee was lawful, split four to three as to whether the search was governed by *Bell* or whether it was governed by a "reasonable suspicion" standard. *See McGee*, 105 S.W.3d at 616-19.

Standing opposite to the jurisdictions that permit warrantless searches, the Ninth Circuit Court of Appeals and the courts of Virginia have concluded that the Fourth Amendment requires a warrant to conduct visual body cavity searches of arrestees when those searches are not justified by threats to institutional security (App. 21a). *See Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1449 (9th Cir. 1991); *Burton v. Spokane*, 2007 US Dist LEXIS 42101, *10 (E. D. Wash. 2007) (unpublished decision); *King v. Commonwealth*, 49 Va. App. 717, 724-27 (Va. Ct. App. 2007); *Hughes v. Commonwealth*, 31 Va. App. 447, 460 (Va. Ct. App. 2000); *Commonwealth v. Gilmore*, 27 Va. App. 320, 331 n. 5 (Va. Ct. App. 1998); *see also McGee*, 105 S.W.3d at 619-20 (Price, J., dissenting) (warrant required to conduct visual body cavity searches of arrestees).[7] Put differently, these courts have concluded that investigatory visual body cavity searches of arrestees fall completely outside the "reasonableness" ambit of *Bell*.

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[7] Other states have passed statutes requiring a warrant for investigatory visual body cavity searches of arrestees. *See, e.g.*, N. J. Stat. Ann. § 2d:161a-3 (West 1998); Tenn. Code. Ann. § 40-7-121(a) (1998).

These courts have required warrants because they liken visual body cavity searches to intrusions into the body which, under *Schmerber v. California, supra,* are permitted without a warrant only under exigent circumstances (App. 16a-17a). *See Fuller*, 950 F.2d at 1449; *Hughes*, 31 Va. App. at 460; *McGee*, 105 S.W.3d at 619-20 (Price, J., dissenting). And, these same courts have found *Bell*, which permitted warrantless visual body cavity searches of pretrial detainees, inapplicable to investigatory visual body cavity searches because the searches conducted in *Bell* were performed for the paramount governmental interest of maintaining institutional security in residential detention centers and prisons, a justification that is absent for investigatory searches of arrestees (App. 20a). *See Gilmore*, 27 Va. App. at 331 n. 5.

Further, while this Court created the *Bell* reasonableness test for "convicted prisoners" and "pre-trial detainees" -- *i.e.*, people who had lost "some" of their Fourth Amendment rights upon their commitment (App. 24a) -- the aforementioned courts have ruled that arrestees, who have not yet even been arraigned and entered into the prison system, enjoy greater constitutional protections. *See, e.g., Fuller*, 950 F.2d at 1448; *King*, 49 Va. App. at 725; *Gilmore*, 27 Va. App. at 331 n. 5; *see also Salinas v. Breier*, 695 F.2d 1073, 1083 (7th Cir. 1982) ("there is considerably greater constitutional power in the police to search the bodies of persons in custody than the bodies of persons not in custody"). Thus, for the courts that require warrants, not only is *Bell* inapplicable for the two aforementioned reasons, but

the visual body cavity searches constitute intrusions into the body under *Schmerber*.[8]

This issue has split not only the courts, but also legal scholars. Some argue for the Ninth Circuit's standard, concluding that the Fourth Amendment requires that investigatory searches be subject to a determination by a neutral and detached magistrate. *See, e.g.*, Eugene Shapiro, *Strip Searches Incident to Arrest: Cabining the Authority to Humiliate*, 83 N. Dak. L. Rev. 67, 108 (2007) [hereinafter Shapiro, *Strip Searches Incident to Arrest*]; William Simonitsch, *Visual Body Cavity Searches Incident to Arrest: Validity Under the Fourth Amendment*, 54 U. Miami L. Rev. 665 (2000) [hereinafter Simonitsch, *Visual Body Cavity Searches*]; Michael G. Rogers, *Bodily Intrusions in Search of Evidence: Fourth Amendment Decisionmaking*, 62 Ind. L.J. 1181, 1191 (1987). Others suggest that such strip and visual body cavity searches incident to arrest fall outside the warrant requirement and that the reasonable suspicion standard should apply. *See, e.g.*, Helmer, *Strip Search and the Felony Detainee*, *supra*.

In sum, a deep divide has developed among the federal and state courts with regards to the propriety of conducting visual body cavity searches of arrestees to recover evidence. While the majority of jurisdictions have held that the Fourth

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[8] The two concurring judges here, in writing that a warrant should be required for investigatory visual body cavity searches of arrestees, expressly relied on this reasoning (App. 18a-23a).

Amendment permits such warrantless searches, the Ninth Circuit Court of Appeals and the courts of Virginia require a warrant absent exigent circumstances. And even among the states and circuits that allow warrantless visual body cavity searches incident to arrest, the courts are split as to what constitutes the appropriate legal standard for evaluating the propriety of such searches. Some courts follow the four-factor *Bell* test, while others have held that *Bell* demands "reasonable suspicion." Still others have applied the "reasonable suspicion" standard, but have done so from outside the *Bell* paradigm. Lastly, courts, while approving of warrantless searches, have even required the higher standard of probable cause.[9]

What these differing opinions among the courts and scholars highlight, and what the division in the New York Court of Appeals suggests, is that the guidance of this Court is urgently needed. *See, e.g.*, Deborah MacGregor, *Stripped of All Reason? The Appropriate Standard for Evaluating Strip Searches of Arrestees and Pretrial Detainees*, 36 Colum. J.L. & Soc. Probs. 163, 206-07 (2003) (the "varied

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[9] This confusion is hardly surprising given that this Court's decisions in other areas are cited in support of the opposite conclusions reached by courts nationwide on the issue now presented. *Compare Maryland v. Buie*, 494 U.S. 325 (1990) (post-arrest searches of property must be justified by specific facts establishing that search was necessary), *Schmerber*, 384 U.S. at 757 (intrusions into body require warrant), *with Bell*, 441 U.S. at 520 (warrantless visual body cavity searches of detainees reasonable); *Robinson*, 414 U.S. at 234 (full warrantless search incident to arrest permissible).

approaches lower courts have taken to analyzing the question of arrestees' ... rights to be free from unreasonable strip searches demonstrate the level of confusion that exists in this area of the law. Such confusion in a major area of civil rights can lead to an increase in lawsuits and frustration on the part of correctional officials and detainees."); *see also* Shapiro, *Strip Searches Incident To Arrest*, *supra* at 67 ("[o]ne of the more puzzling characteristics of current Fourth Amendment jurisprudence has been the inadequacy of judicial evaluation of [arrestees'] strip searches").

The need to resolve this conflict among the lower courts is especially pressing because in Virginia there is a direct conflict between the state courts and the Fourth Circuit Court of Appeals, which has jurisdiction over that state. *Compare Amaechi*, 237 F.3d at 361-63 (strip and visual cavity searches analyzed under *Bell* reasonableness factors), *with King*, 49 Va. App. at 724-27 (warrant needed for investigatory visual body cavity search of arrestee).

C. This Case is the Perfect Vehicle for Deciding This Extremely Important and Frequently Arising Issue of Law.

Without question, a strip and visual body cavity search subjects an arrestee to a "gross interference" in his personal privacy. *See Swain*, 117 F.3d at 6 (*citing Arruda v. Fair*, 710 F.2d 886, 887 [1st Cir. 1983]). Such a search, regardless of the manner in which it is conducted, is an "embarrassing and humiliating experience." *Boren v. Deland*, 958 F.2d 987, 988 n. 1 (10th Cir. 1992);

see also Kennedy v. Los Angeles, 901 F.2d 702, 711 (9th Cir. 1990); *Mary Beth G.*, 723 F.2d at 1272. The intrusive nature of these searches alone evinces that the constitutional limits on such searches should be dictated by this Court. Notwithstanding the obvious importance of this issue, litigation concerning the propriety of such searches arises very frequently because the question has not been addressed in this Court. The result, as noted, has been a deep split.

And this case presents an ideal opportunity for this Court to resolve this split and decide whether the Fourth Amendment permits warrantless strip and visual body cavity searches of arrestees. The New York Court of Appeals squarely confronted the issue of whether it was "constitutionally permissible for police to subject a person arrested for a drug sale to a [warrantless] visual body inspection" (App. 1a). In deciding that issue, the majority opinion directly concluded "that the Fourth Amendment does not prohibit a visual cavity inspection if the police have at least a reasonable suspicion to believe that contraband, evidence or a weapon is hidden inside the arrestee's body" (App. 8a). The majority based this rule on the *Bell* "balancing test" (App. 7a-8a). Thus, this case presents no procedural hurdles that could prevent this Court from reaching this central issue.

2. IN HOLDING THAT THE POLICE INTRUDED INTO RESPONDENT'S BODY BY PULLING ON THE STRING PROTRUDING FROM HIS RECTUM -- AND THEREFORE THAT A WARRANT WAS REQUIRED UNDER *SCHMERBER* -- THE MAJORITY OPINION OF THE NEW YORK COURT OF APPEALS CONFLICTS WITH THAT OF OTHER COURTS NATIONWIDE. MOREOVER, THAT OPINION CREATES A DANGEROUS LEGAL STANDARD THAT CONTRAVENES THIS COURT'S CONTROLLING PRECEDENT.

In *Schmerber,* this Court reaffirmed the well-settled principle that there is an "unrestricted" right to search the accused incident to a lawful arrest "to discover and seize the fruits or evidences of crime." 384 U.S. at 769. However, this Court determined, the rules governing typical searches incident to arrest have "little applicability with respect to searches involving intrusions beyond the body's surface." *Id.* Rather, where "intrusions into the human body are concerned," police must have a "clear indication" that evidence will be found inside the body, and the police must first obtain a warrant unless there are exigent circumstances that justify dispensing with the warrant. *Id.* at 770.

The *Schmerber* case involved the warrantless extraction of blood via a needle inserted into the defendant's arm. The extraction was incident to *Schmerber*'s lawful arrest for driving under the influence of alcohol. This Court opined that a warrant was ordinarily required for such an

intrusion inside the body. *Id.* However, because an arrestee's blood-alcohol level "begins to diminish shortly after drinking stops," time was critical. Therefore, the police were presented with exigent circumstances that justified dispensing with the warrant. *Id.*

At issue here is what constitutes an "intrusion[ ] beyond the body's surface" requiring a warrant under *Schmerber*. The four judges writing for the majority held that by pulling the string that was protruding three inches beyond the surface of respondent's rectum, the police intruded into respondent's body, and therefore, under *Schmerber*, they should have first obtained a warrant (App. 15a). As a result, the majority suppressed the recovered drugs and dismissed the felony indictment. The three judges in dissent argued that because no "officer put a hand or implement in [respondent's] body," *"Schmerber* [was] inapplicable ... for the simple reason that no one intruded into [respondent's] body" (App. 33a).

Like the majority and dissent here, courts nationwide have split over whether the removal of an item partially protruding from a suspect's body cavity constitutes an intrusion into the body requiring a warrant. By granting *certiorari*, this Court will obtain an opportunity to settle this split in jurisprudence, clarify what constitutes an intrusion into the body under *Schmerber*, and reverse this erroneous decision of the New York Court of Appeals.

A. Courts Nationwide Have Split On The Question Of Whether the Removal Of An Object Protruding From An Arrestee's Body Cavity Is An Intrusion Into The Body Within The Meaning Of *Schmerber*.

As explained, in *Schmerber*, which involved the insertion of a needle into the arrestee's arm, puncturing his skin in order to withdraw blood, this Court forbade warrantless "intrusions into the body" absent exigent circumstances.

From this, in the forty years since *Schmerber*, courts have unanimously held that the insertion into the body of a foreign object, such as an endoscope, surgical instrument, or speculum, constitutes an "intrusion into the body" under *Schmerber*. *See, e.g.*, *Winston v. Lee*, 470 U.S. 753, 755 (1983) (*Schmerber* applied to warrantless surgery to remove bullet embedded in skin); *United States v. Nelson*, 36 F.3d 758, 761 (8th Cir. 1994) (warrantless endoscopic examination unlawful under *Schmerber*); *United States v. Cameron*, 538 F.2d 254, 258 (9th Cir. 1976) (enema and forced consumption of laxatives ruled unlawful under *Schmerber*); *State v. Clark*, 654 P.2d 355, 361 (Haw. 1982) (penetration of vagina with speculum to retrieve money, unlawful under *Schmerber*).

The same is true for the digital penetration of an arrestee's body cavities. *United States v. Oyekan*, 786 F.2d 832 (8th Cir. 1986) (digital "rectal probe and pelvic examination" of arrestee unreasonable under *Schmerber*); *Amaechi*, 237 F.3d at 361-63 (digital penetration of arrestee's vagina unlawful); *Gilmore*, 27 Va. App. at 320 (insertion of

hand inside vagina to recover money, unlawful under *Schmerber*); *State v. Fontenot*, 383 So. 2d 365 (La. 1980) (manual retrieval of bottle from inside vagina during "pelvic examination" unreasonable under *Schmerber*). This is because those types of searches involve the actual police intrusion beneath the body's surface, like in *Schmerber*. Thus, for the aforementioned searches, absent exigent circumstances, the police must obtain a warrant.

However, where the search of an arrestee does not involve the physical penetration of the human body, the courts have been unable to agree upon a rule. For example, as explained in Point I, *supra*, the Ninth Circuit Court of Appeals and the courts of Virginia hold that a mere visual inspection of an arrestee's body cavities constitutes an intrusion into the body under *Schmerber*. *See Fuller*, 950 F.2d at 1449 (warrant required for visual body cavity search of arrestee because *Schmerber* governs all invasive searches "whether by a needle ... or a visual intrusion into a body cavity"); *King*, 49 Va. App. at 724-27 (warrantless visual body cavity search falls under *Schmerber*); *Commonwealth v. Moss*, 30 Va. App. 219, 224-26 (Va. Ct. App. 1999) (applying *Schmerber* to strip search). Similarly, courts have held that an x-ray incident to arrest constitutes an intrusion into the body requiring a warrant. *See United States v. Allen*, 337 F. Supp. 1041 (E.D. Pa. 1972) (x-ray of arrestee falls under *Schmerber*); *State v. Palmer*, 803 P.2d 1249 (Utah. Ct. App. 1990) (same); *People v. Williams*, 157 Ill. App. 3d 496 (Ill. App. Ct. 1987) (same); *State v. Mabon*, 648 S.W.2d 271 (Tenn. Crim. App. 1982) (same); *see also United States v. Elk*, 676 F.2d 379 (9th Cir. 1982) (in

context of border search, held that *Schmerber* applied to x-ray search). But, as noted in Point I(B), *supra*, the majority of federal and state courts have held that visual searches and inspections, which involve no instrumental or digital penetration of the body, do not constitute an intrusion into the body under *Schmerber*.

Likewise, the federal and state courts have failed to come to agreement as to whether the swabbing of the inside of an arrestee's mouth to obtain saliva for a DNA sample constitutes an intrusion into the body under *Schmerber*. *See United States v. Nicolosi*, 885 F. Supp. 50, 53 (E.D.N.Y. 1995) (because critical element of *Schmerber* was the collection of "physical evidence below the skin" versus evidence "outside the skin," warrant required to swab arrestee's mouth for saliva); *see also In re: Shaddie Clark Shabazz*, 200 F. Supp. 2d 578 (D.S.C. 2002) (same); *Henry v. Ryan*, 775 F. Supp. 247 (N.D. Ill. 1991) (same); *but see In re Nontestimonial Identification Order Directed To R.H.*, 171 Vt. 227, 233-34 (Vt. 2001) (critical element in *Schmerber* was "piercing" the skin, thus, no warrant required to swab arrestee's mouth).

Most pertinent here, the courts have split as to whether the removal of an object which is embedded within the body, but which protrudes outside the body and can be removed without any actual physical penetration, constitutes an "intrusion into the body" falling under *Schmerber*. On one side, and as the four judges in the majority ruled here, are holdings that "the removal of an object protruding from a body cavity, regardless of

whether any insertion into the body cavity is necessary, is subject to the *Schmerber* rule" (App. 12a). *See, e.g., State v. Barnes*, 159 P.3d 589 (Ariz. Ct. App. 2007) (2-1 decision) (removal of bag of narcotics partially secreted in the defendant's rectum was intrusion into body under *Schmerber*), *review dismissed*, 2008 Ariz. LEXIS 38 (Ariz. 2008); *People v. More*, 97 N.Y.2d 209 (N.Y. 2002) (seizure of bag "partially protruding" from rectum fell under *Schmerber*); *Hughes*, 31 Va. App. at 447 (removal of a plastic bag protruding halfway out of rectum constituted an "intrusive physical body cavity search" under *Schmerber*); *State v. Kangas*, 1998 Ohio. App. LEXIS 5417 (Ohio Ct. App. 1998) (unpublished decision) (implying that if cocaine had been partially secreted in rectum, warrant would have been needed to remove it); *State v. Bullock*, 661 So. 2d 1074 (La. App. 4th Cir. 1995) (removal of cocaine partially protruding from vagina unlawful under *Schmerber*).

Other jurists, like the three judges writing in dissent here, have taken the opposite approach, ruling that as long as the police do not penetrate the surface of an arrestee's skin, *Schmerber* does not apply. *See, e.g., State v. Himmelwright*, 551 F.2d 991 (5th Cir. 1977) (during visual body cavity search, police saw cocaine-filled condom protruding from arrestee's vagina; removal of condom did not elevate search to unlawful manual body cavity search); *United States v. Holtz*, 479 F.2d 89 (9th Cir. 1973) (cocaine-filled condom, which protruded out of arrestee's vagina, properly removed without warrant and did not fall under *Schmerber*); *Barnes*, 159 P.3d at 594-95 (Espinosa, J., dissenting) (removal of bag

protruding from rectum not intrusion into body under *Schmerber*); *State v. Nieves*, 383 Md. 573 (Md. 2004) (search held unlawful for lack of reasonable suspicion, but court concluded that removal of protruding bag was not "a physical body cavity search" requiring warrant); *State v. Jones*, 887 P.2d 461 (Was. Ct. App. 1995) (removal of tube protruding from anus during strip search was not unlawful body cavity search); *State v. Kelly*, 1993 Ohio App. LEXIS 3292 (Ohio Ct. App. 1993) (unpublished decision) (removal of condom partially protruding from rectum not body cavity search); *see also State v. Voichahoske*, 271 Neb. 64 (Neb. 2006) (while not directly confronting issue, removal of drugs "protruding" from rectum was part of strip search); *Taylor v. Commonwealth*, 28 Va. App. 638 (Va. Ct. App. 1998) (same). These courts have determined that as long as the police were in a lawful position to see the object protruding from the body cavity, i.e. they conducted a lawful visual body cavity search of the arrestee, it was then proper for them to seize what they saw in plain view (App. 36a).

In short, review of this case is needed to clarify what constitutes an intrusion into the body under *Schmerber*. *See* Simonitsch, *Visual Body Cavity Searches Incident to Arrest*, at 671 (highlighting that this Court, in *Schmerber*, did "not take the opportunity to speak more on intrusions beyond the body's surface," and specifically, "on what an intrusion entails"). While the courts of this nation have unanimously concluded that the insertion of an instrument or digit into an arrestee's body requires a warrant under *Schmerber*, the courts have split on whether other types of searches,

i.e., the visual inspection of an arrestee's body cavities, the x-ray of an arrestee, and the collection of DNA from a suspect's mouth, constitute such an intrusion. And specifically in this situation, forty-two years after *Schmerber*, the courts are sharply split on whether the removal of an object protruding from a suspect, but still partially concealed within his body, requires a warrant.

B. The Majority Opinion of the New York Court Of Appeals Is Fundamentally Flawed, And It Creates A New and Dangerous Legal Standard That Benefits Neither Arrestees Nor The Police.

As explained, the police in *Schmerber* inserted a needle into the suspect's arm in order to gather evidence of the crime. Simply put, the search in *Schmerber* pierced the skin of the suspect. In examining this search, this Court held that such an "intrusion[ ] into the body" required a warrant absent exigent circumstances.

The decision of the New York Court of Appeals directly conflicts with the principles and rule enunciated by *Schmerber*. In that regard, in holding that the "*Schmerber* rule" applied here, the majority ruled that the "removal of an object protruding from a body cavity, *regardless of whether any insertion into the body cavity is necessary*," required a warrant absent exigent circumstances (App. 12a). Thus, while *Schmerber* applied expressly to insertions into the body, the majority here turned *Schmerber* on its head, ruling that *Schmerber* applied "regardless of whether any insertion into the body cavity" was performed.

Put differently, as Justice Espinosa wrote in his dissent in *Barnes*, 215 Ariz. at 284 fn. 8, which analyzed an almost identical search:

> the record establishes that no intrusion, gentle or otherwise, occurred, notwithstanding the majority's novel theory that removal of the plastic baggie [partially embedded in defendant's rectum] 'had the effect' of exerting some type of 'force' within the body. *Schmerber*, however, does not rely on such delicate quantum mechanics, nor should the reasonableness of an otherwise lawful search.

Similarly here, there was no intrusion into the body, and the majority's expansion of *Schmerber* should be struck down by this Court.

Perhaps more importantly, the Court of Appeals decision here, as the dissent aptly recognized (App. 36a), creates a cumbersome legal requirement -- obtaining a search warrant -- that provides no benefit even to arrestees. In that regard, under the majority's rule, when the police have lawfully conducted a strip and visual body cavity search of a suspect, and have lawfully observed contraband protruding from a cavity, they must then halt the search and secure the arrestee while the police obtain a search warrant from a judge. In the meantime, for the hours during which the police await the issuance of the search warrant -- which will inevitably be issued because its basis is the

direct observation of contraband -- the arrestee must be held under constant observation that will be more degrading than the quick, non-invasive removal of that which the warrant will necessarily order removed. And of course, during that lengthy time period, there will be some danger of the unintended ingestion of the drug being concealed. In other words, the rule benefits no one, causing state expense and inconvenience as well as humiliation and danger to the arrestee.

Of course, penetration of the body with either a hand or instrument to retrieve contraband raises grave considerations for a person's privacy, dignity, and health, and public policy dictates that a warrant should be required. *See Schmerber,* 384 U.S. at 769-70. But here, it "makes little sense ... to require officers to obtain a warrant ... where contraband is visible between the cheeks of the buttocks and may be retrieved easily, without harm to the individual, but may be partially secreted in the rectum" (App. 36a) (*citing Barnes*, 215 Ariz. at 285). Indeed, as the dissent explained here, "it is [not] unreasonable for the officers to take, with minimal force, what they have already lawfully seen" (App. 36a). *See, e.g., Horton* v. *California*, 496 U.S. 128 (1990) (police need not obtain a warrant to seize evidence that is in plain view and that they are lawfully situated to observe). The majority's warrant requirement is even more perplexing given that, in New York as well as other jurisdictions, the police can lawfully seize contraband found between the cheeks of the buttocks, *see People v. Walker*, 27 A.D.3d 899 (N.Y. App. Div. 2006); *Thomas*, 429 Mass. at 407-08; *McGee*, 105 S.W.3d at 613; *People v. Wade*, 208 Cal.

App. 3d 304 (1989), but must now obtain a warrant when that same contraband is partially concealed in a cavity.

Lastly, the rule espoused by the dissent here, which would permit the warrantless recovery of discovered contraband as long as the officer does not have to insert an implement or hand into the suspect's body, is a bright-line rule that makes sense. *See, e.g., New York v. Belton*, 453 U.S. 454 (1981) (Fourth Amendment doctrine should be expressed in "readily applicable" terms, and should not require the "drawing of subtle nuances and hairline distinctions"). It permits the police promptly and efficiently to complete necessary searches that have little chance of injuring the suspect, *United States v. Ross*, 456 U.S. 798 (1982) ("When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions ... must give way to the interest in the prompt and efficient completion of the task at hand"), while it requires the police to obtain judicial sanction before undertaking the highly intrusive step of penetrating the suspect's body.

C. There Is No Doubt That This Issue Presents a Federal Question.

Finally, this issue undoubtedly presents a question of federal constitutional law. In ordering that the drugs recovered from respondent's rectum be suppressed, the majority held that "when the police physically removed the object that was attached to the string without first obtaining a warrant, they conducted an unreasonable manual

body cavity search in violation of the Fourth Amendment" (App. 15a).[10] In fact, the majority specifically noted that the "preeminent decision examining the constitutional dimensions of searches that involve police intrusion into a person's body is *Schmerber*," and from this "stressed that *Schmerber* requires the police to obtain a warrant authorizing the removal of the plastic bag in the absence of the exigent circumstances justifying an immediate seizure of the item" (App. 4a, 15a).

The single New York state case relied upon by the majority, *More*, 97 N.Y.2d at 209, also involved a direct application of *Schmerber* and the principles of the Fourth Amendment. In *More*, during a body cavity search conducted at the defendant's apartment, the police forcibly removed a plastic bag protruding from his rectum. In suppressing the recovered narcotics, the Court of Appeals explained that the "dispositive issue" was "the validity of that seizure under the Fourth Amendment of the United States Constitution." *More*, 97 N.Y.2d at 211. And in analyzing whether the Fourth Amendment required a warrant, the Court of Appeals held that the search was "at least as" intrusive as the search conducted in *Schmerber*, and therefore was governed by the clear indication and exigent circumstances requirements of *Schmerber*. *Id.* at 213. Notably, the majority opinion here described *More* as holding that

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[10] Here, the Court of Appeals was clearly referring to the Fourth Amendment of the United States Constitution, as the Search and Seizure Clause of the New York Constitution is found in Article 1 § 12.

"the removal of the object from the defendant's rectum without prior judicial authorization violated the Fourth Amendment" (App. 11a).

In short, there is no doubt that the New York Court of Appeals' decision turned directly on federal constitutional law.

* * *

In sum, in the forty-two years since *Schmerber*, courts nationwide have struggled to interpret what constitutes an intrusion into the body requiring a warrant. And in this particular context, where the police pulled a string protruding from respondent's rectum, the courts are split. By granting *certiorari* here, this Court can clarify what constitutes an intrusion into the body, and further, resolve the split among this nation's courts.

CONCLUSION

This Court should issue a writ of *certiorari* here to review the decision of the New York Court of Appeals.

Respectfully submitted,

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Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NEW YORK,

Petitioner,

- versus -

AZIM HALL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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JUNE 13, 2008

APPENDIX

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This opinion is uncorrected and subject to revision before publication in the New York Reports.

No. 29

The People of the State of New York,
Respondent,
v.
Azim Hall,
Appellant.

Barbara Zolot, for appellant.
Eric Rosen, for respondent.

GRAFFEO, J.:

In this case, we must consider whether it is constitutionally permissible for police to subject a person arrested for a drug sale to a visual body inspection followed by a body cavity search without first obtaining a warrant. We conclude that a visual body inspection may be conducted if the police have a factual basis supporting a reasonable suspicion that the arrestee has evidence concealed inside a body cavity and the search is conducted in a reasonable manner. If the visual inspection reveals the presence of a suspicious object, the police must obtain a warrant authorizing the

object's removal unless there are exigent circumstances.[1]

I

During the evening of February 10, 2005, a team of police officers conducted a narcotics interdiction operation in Manhattan. Sergeant Burnes, a 20-year police veteran with extensive drug arrest experience, was stationed on the roof of a building observing individuals on the street below through binoculars. Burnes saw a man named Meyers that he recognized from the neighborhood standing outside a bodega. Two individuals approached Meyers, spoke with him and handed him money. Meyers then walked over to defendant, conversed briefly with him and gave him the cash.

Defendant went into the bodega while Meyers stood near the front door. After being inside the store for about three minutes, defendant reappeared and handed something to Meyers. Meyers approached the individuals who had given him the money and held out his hand to them. Sergeant Burnes observed two small, white objects in Meyers' hand that appeared to be crack cocaine.

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[1] Five members of this Court (Chief Judge Kaye, Judges Read, Smith, Pigott and myself) agree that the reasonable suspicion standard applies to visual body cavity inspections. Four members (Chief Judge Kaye, Judges Ciparick, Jones and myself) conclude that an object protruding from a body cavity cannot be removed without a warrant unless there are exigent circumstances. Judges Ciparick and Jones disagree with the majority on the first issue; Judges Read, Smith and Pigott disagree with the majority on the second issue.

Each of the men took one piece and departed. A short time later, defendant and Meyers walked away from the bodega, heading in different directions. Burnes then contacted officer Speigel on the street using radio communication and eventually defendant and Meyers were taken into police custody.

Defendant was transported to a police station where Spiegel searched his clothing but no drugs were found. Spiegel placed defendant in a private detention cell and asked him to remove his clothing. Burnes entered the cell and defendant was ordered to bend over or squat, at which point Spiegel and Burnes observed a string or piece of plastic hanging out of defendant's rectum. Believing that the string was attached to a package of drugs hidden inside defendant's body, Burnes ordered defendant to remove the object. When defendant refused, Spiegel proceeded to hold defendant while Burnes pulled on the string and removed a plastic bag that was found to contain crack cocaine.

Defendant was indicted for criminal possession of a controlled substance in the third and fifth degrees. Prior to trial, he moved to suppress the drugs taken from his body, claiming that the police were required to obtain a warrant before examining his body cavity. Supreme Court granted the motion and dismissed the indictment. The Appellate Division reversed, concluding that the visual inspection of defendant's body cavity was permissible because the police had reasonable suspicion to believe that defendant had narcotics hidden inside his body and that, once the string was discovered, the police were allowed to

immediately retrieve the drugs without first obtaining a warrant. A Judge of this Court granted leave.

II

There are three distinct and increasingly intrusive types of bodily examinations undertaken by law enforcement after certain arrests and it is critical to differentiate between these categories of searches. A "strip search" requires the arrestee to disrobe so that a police officer can visually inspect the person's body. The second type of examination -- a "visual body cavity inspection" -- occurs when a police officer looks at the arrestee's anal or genital cavities, usually by asking the arrestee to bend over; however, the officer does not touch the arrestee's body cavity. In contrast, a "manual body cavity search" includes some degree of touching or probing of a body cavity that causes a physical intrusion beyond the body's surface.[2]

The preeminent decision examining the constitutional dimensions of searches that involve police intrusion into a person's body is Schmerber v California (384 US 757 [1966]). In that case, a police officer had a physician at a hospital draw a blood sample to determine the level of alcohol that was in the blood of an individual arrested after a motor vehicle accident. Recognizing that "interests in human dignity and privacy" arise whenever the

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[2] See e.g. Paulino v State, 399 Md 341, 352, 924 A2d 308, 315 (2007), cert denied __ US __, 128 S Ct 709 (2007); Blackburn v Snow, 771 F2d 556, n 3 (1st Cir 1985); McGee v State, 105 SW3d 609, 615 (Tx Ct Crim App 2003); Kamins, New York Search and Seizure § 4.03 (5), at 4-141 (2007).

police need to enter a person's body to secure evidence, the United States Supreme Court concluded that a lawful arrest alone does not justify police intrusion in a person's body (id. at 769-770). Rather, there must be "a clear indication that . . . [relevant] evidence will be found" inside an arrestee's body and a search warrant authorizing the seizure of evidence must be obtained unless an emergency situation exists (id. at 770).[3] In Schmerber, the Supreme Court determined that the blood evidence was legally obtained and admissible because the extraction was performed in a reasonable manner under exigent circumstances.[4]

Although Schmerber did not address the constitutionality of less intrusive visual inspections of an arrestee's body, post-Schmerber precedent demonstrates considerable judicial consensus

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[3] "Clear indication" means "the necessity for particularized suspicion that the evidence sought might be found within the body of the individual"; it is not "a third Fourth Amendment threshold between 'reasonable suspicion' and 'probable cause'" (United States v Montoya de Hernandez, 473 US 531, 540 [1985]). Because Schmerber mandates a warrant in the absence of exigent circumstances, the clear indication test requires that searches beyond the surface of a person's body be supported by at least probable cause.

[4] The Court concluded that an emergency existed because the percentage of alcohol in the blood begins to diminish shortly after the person stops drinking, which meant that the time expended to secure a warrant would have caused relevant evidence to degrade or disappear (see Schmerber, 384 US at 770-771).

concluding that visual body inspections are constitutionally distinct from searches that require the police to intrude beyond the surface of a person's body and that the two types of searches are therefore subject to different legal standards. In Bell v Wolfish (441 US 520 [1979]), the United States Supreme Court upheld the blanket policy of a pretrial detention center that conducted visual body cavity examinations of detainees following visitations with persons from outside the facility. In assessing the legality of this practice under the Fourth Amendment, the Supreme Court explained that various factors should be considered, including "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted" (id. at 559). Weighing these interests, along with the fact that the smuggling of contraband was a frequent problem posing significant security concerns for detention centers, the Court held that such visual cavity searches of pretrial detainees could be conducted on less than probable cause grounds so long as they were conducted in a reasonable manner (id. at 559-560).

The Supreme Court has yet to address the question of whether warrantless strip searches of persons arrested -- as opposed to pretrial detainees -- can be performed in a manner that satisfies constitutional requirements (see Illinois v LaFayette, 462 US 640, 646 n 2 [1983]). Nevertheless, it is clear that reasonableness is the "ultimate touchstone of the Fourth Amendment" (Brigham City, Utah v Stuart, 547 US 398, 403 [2006] [internal quotation marks omitted]; see Wolfish, 441 US at 558 [the "Fourth Amendment

prohibits only unreasonable searches"]). Our task, then, is to determine whether it is reasonable to draw a constitutional distinction between a visual inspection of an arrestee's body (which requires no touching of the person's body whatsoever) and a manual body cavity search (which necessarily results in an intrusion beyond the body's surface and possibly the removal of an object or the insertion of an instrument into an orifice).

The majority of appellate courts to consider the propriety of visual inspections have applied the reasoning of Wolfish and recognized that the difference in the degree of intrusiveness between visual and manual body cavity searches provides ample justification for applying a standard less stringent than Schmerber to visual cavity inspections of arrestees. Thus, it has been held that a visual body cavity search of an arrestee may be justified by a reasonable suspicion that the arrestee is concealing a weapon or contraband (see Swain v Spinney, 117 F3d 1, 5 [1st Cir 1997]), which could be supported by consideration of "the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest" (Weber v Dell, 804 F2d 796, 802 [2d Cir 1986], cert denied sub nom. County of Monroe v Weber, 483 US 1020 [1987]; see e.g. Campbell v Miller, 499 F3d 711, 718 [7th Cir 2007]; Stewart v Lubbock County, Texas, 767 F2d 153, 156-157 [5th Cir 1985], cert denied 475 US 1066 [1986]; Mary Beth G. v City of Chicago, 723 F2d 1263, 1273 [7th Cir 1983]; Sarnicola v County of Westchester, 229 F Supp 2d 259, 269-271 [SD NY 2002]; see also Blackburn v Snow, 771 F2d at 562; but see Fuller v M.G. Jewelry, 950 F2d 1437, 1448-1449 [9th Cir 1991]).

These decisions stand for the principle that the Fourth Amendment does not prohibit a visual cavity inspection if the police have at least a reasonable suspicion to believe that contraband, evidence or a weapon is hidden inside the arrestee's body. As the balancing test in Wolfish suggests, the "reasonable suspicion" standard must take into account the nature of the crime charged, the circumstances of the arrest and the scope of the particular intrusion. Unlike manual body cavity searches, strip searches and visual cavity inspections do not create a risk of physical pain or injury to arrestees. Because a manual cavity search is more intrusive and gives rise to heightened privacy and health concerns, when weighed against the legitimate needs of law enforcement, we believe it should be subject to a stricter legal standard.

The concurrence maintains that Wolfish is not particularly relevant to the assessment of whether reasonable suspicion should govern visual cavity inspections because it focused on the need to maintain institutional security (see concurring op at 7-8). It is true that Wolfish addressed security concerns that are not present in this case. But this alone does not render the rationale and analytical framework of Wolfish irrelevant. Wolfish recognized that there is a legitimate interest in preventing drugs from being distributed in a secure law enforcement facility (see Wolfish, 441 US at 559) -- which a police station surely is -- and the Supreme Court has repeatedly reiterated that there is nothing unreasonable about allowing the police to conduct a search of an arrestee incident to an arrest for the purpose of preserving evidence

(see e.g. Knowles v Iowa, 525 US 113, 116 [1998]; United States v Robinson, 414 US 218, 234-235 [1973]).[5]

Schmerber, however, dictates that a more stringent standard be applied to a physical search of an arrestee's body cavity. Our most recent decision addressing a search into a person's body is People v More (97 NY2d 209 [2002]). In that case, the police entered a residence and found the defendant sitting near drugs and drug paraphernalia. They took him into a room in the apartment, had him remove his clothing and made him bend at the waist to check whether he had drugs hidden between his buttocks. When the police saw a plastic bag protruding from the defendant's rectum, they forcibly removed it.[6]

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[5] The concurrence further reasons that visual body inspections are unnecessary because precincts contain numerous detention and holding cells that can be used to segregate and monitor arrestees pending the issuance of warrants (see concurring op at 9). This is simply not the case throughout our State. In rural locales, there may be a limited number of State Troopers, deputy sheriffs or municipal police officers on duty covering expansive geographical regions -- and some towns and villages do not maintain their own police forces. This presents a practical difficulty in keeping an arrestee suspected of having drugs hidden in his body segregated from other arrestees and under constant surveillance. We should not adopt a rule that conditions the constitutionality of a visual inspection on the relative availability of law enforcement resources.

[6] The lurid facts described by the defendant in his brief in More, and quoted at length in the dissent (see dissenting op at 3), are simply not those found by the suppression court, affirmed by the Appellate Division and

(Continued...)

We recognized that a search of this nature was "at least as intrusive as [the] blood test procedures" in Schmerber (id. at 213). As a result, the actions of the police were constitutionally permissible only if the People could satisfy the clear indication and exigent circumstance requirements of Schmerber. We determined that the record before us was "devoid of any evidence from which an officer 'might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant' posed a threat to the officer's personal safety or of the destruction of the evidence" (id. at 214, quoting Schmerber, 384 US at 770). Because there were no exigent circumstances supporting the warrantless intrusion into the suspect's body, we held that the removal of the object from the defendant's rectum without prior judicial authorization violated the Fourth Amendment (see More, 97 NY2d at 214).[7]

(...Continued)

relied on by this Court in its decision. In that case, as this Court noted, an outer portion of the plastic bag containing cocaine was protruding from the defendant's rectum, yet the description illustrates the perils of attempting to remove even a protruding article from an arrestee's body cavity.

[7] Although we declined in More to discuss the validity of body cavity searches conducted at a police station (see 97 NY2d at 214 n *), it is evident that the location of a search is not the determinative factor under Schmerber because that decision prohibits all warrantless intrusions into an arrestee's body if there is no probable cause and exigent circumstances established, regardless of where the search occurs. Aside from those considerations, the site of a search is relevant only to the reasonableness of the manner in which the search was conducted (i.e., how, where and by whom it was done).

Summarizing the relevant constitutional precedent, it is clear that a strip search must be founded on a reasonable suspicion that the arrestee is concealing evidence underneath clothing and the search must be conducted in a reasonable manner. To advance to the next level required for a visual cavity inspection, the police must have a specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity and the visual inspection must be conducted reasonably. If an object is visually detected or other information provides probable cause that an object is hidden inside the arrestee's body, Schmerber dictates that a warrant be obtained before conducting a body cavity search unless an emergency situation exists. Under our decision in More, the removal of an object protruding from a body cavity, regardless of whether any insertion into the body cavity is necessary, is subject to the Schmerber rule and cannot be accomplished without a warrant unless exigent circumstances reasonably prevent the police from seeking prior judicial authorization.

It is important to emphasize that visual cavity inspections and manual body cavity searches cannot be routinely undertaken as incident to all drug arrests or permitted under a police department's blanket policy that subjects persons suspected of certain crimes to these procedures. There must be particular, individualized facts known to the police that justify subjecting an arrestee to these procedures (see generally People v McIntosh, 96 NY2d 521, 525 [2001]). Our precedent on this point is unequivocal: the police are required to have "specific and articulable facts

which, along with any logical deductions, reasonably prompted the intrusion" (People v Cantor, 36 NY2d 106, 113 [1975]), although they are allowed to "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person" (United States v Arvizu, 534 US 266, 273 [2002] [internal quotation marks omitted]). In addition, the reasonableness of the manner in which the search is conducted should be evaluated by reference to where, how and by whom the inspection occurred (e.g., usually in a private location,[8] by a person of the same gender and without causing the arrestee to suffer further undue humiliation).

III

Applying the reasonable suspicion standard to the facts of this case, the record supports the conclusion of the Appellate Division that the strip search and visual cavity inspection of defendant's body were constitutionally valid because the particular facts, viewed objectively and in their totality, provided the police with reasonable suspicion that defendant had drugs secreted

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[8] We acknowledge that a search other than in a private location is patently unreasonable except in the most extraordinary circumstances (perhaps where necessary to save the life of an arrestee). Thus, in the absence of highly unusual facts, we -- like other courts across the nation -- would condemn public visual cavity inspections as abusive, shameful and unconstitutional (see e.g. Campbell v Miller, 499 F3d at 719).

underneath his clothing and possibly in his body. Defendant had been observed engaging in a hand-to-hand sale of two small quantities of crack cocaine (see Campbell v Miller, 499 F3d at 718 [the police may consider the nature of the crime the defendant committed]). The police saw that, in order to complete the sale, defendant retreated into a building where he lingered for up to three minutes, which suggested that the narcotics defendant then produced outside the bodega were concealed in a place that was not readily accessible. The primary officer also testified that, in his experience (which involved over 1,000 drug arrests), a "good majority" of the persons arrested for narcotic offenses within a four-block radius of where defendant made his sale were found to have drugs hidden between their buttocks.

Considering all of these circumstances, in conjunction with the fact that the police found no drugs in defendant's possession after his arrest or the strip search, the police at that point had reasonable suspicion to believe that defendant had narcotics hidden inside his body. Furthermore, the primary officer participated in the visual cavity inspection, thereby establishing that the officers who conducted the inspection had sufficient information to support the reasonable suspicion that defendant had drugs concealed in his body. Finally, the inspection was reasonable in scope and manner because it was conducted privately in a cell, without undue force and by officers of the same gender as defendant. Thus, the police conduct in this case supports the Appellate Division's conclusion that the proper constitutional

standard for a legal visual body inspection was satisfied.

Once the officers saw the string-like object suspiciously hanging from defendant's rectum, their reasonable suspicion was elevated to probable cause to believe that contraband was concealed in defendant's body. Yet in More, we stated that probable cause alone was not enough to permit the removal of an object protruding from an arrestee's rectum. Instead, we stressed that Schmerber requires the police to obtain a warrant authorizing the removal of the plastic bag in the absence of exigent circumstances justifying an immediate seizure of the item. The suppression record in this case provides no basis for a finding of exigent circumstances since the police officers who testified at the hearing indicated that the purpose of the search was to secure evidence and there was no testimony that the drugs were in imminent danger of being destroyed, disseminated or lost, or that defendant was in medical distress. Thus, when the police physically removed the object that was attached to the string without first obtaining a warrant, they conducted an unreasonable manual body cavity search in violation of the Fourth Amendment. Under these circumstances, More mandates that the recovered drugs be suppressed.

Accordingly, the order of the Appellate Division should be reversed, defendant's motion to suppress granted to the extent of suppressing the drugs recovered and the indictment dismissed.

People v Hall (Azim)
No. 29

CIPARICK, J. (concurring):

I agree with the Court's conclusion that the manual body cavity search at issue here is unconstitutional under People v More (97 NY2d 209 [2002]) and Schmerber v California (384 US 757 [1966]). As a result, the majority correctly concludes that the cocaine that the police forcibly removed from defendant's rectum must be suppressed. I also agree that the reasonable suspicion standard should govern strip searches conducted to disarm suspects and to prevent the destruction or concealment of contraband. I cannot, however, join the majority in holding that visual body cavity searches incident to arrest constitute an exception to the warrant requirement of the Federal and State Search and Seizure Clauses. Rather I would hold that, just like a manual body cavity search, this intrusive, degrading, and humiliating species of search may only be conducted upon a neutral and detached magistrate's issuance of a warrant based upon probable cause or upon satisfaction of Schmerber's clear indication test.

The rule announced in Schmerber is unequivocal. The search incident to arrest exception to the warrant requirement does not apply to "searches involving intrusions beyond the body's surface" (Schmerber, 384 US at 769). Rather, to safeguard the interests in the "human dignity and privacy" that the Search and Seizure Clauses were designed to protect, an intrusion extending beyond the body's surface may not be

undertaken on the "mere chance that evidence might be obtained" (id. at 769-770). It must, instead, be authorized by a warrant issued by a neutral and detached magistrate because "[t]he importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great" (id. at 770). Indeed, the Court reasoned that "[s]earch warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned" (id.).

Nonetheless, Schmerber does not require a warrant for all bodily intrusions. An exception to its rule is permitted if three demonstrable facts are established: a "clear indication" that relevant evidence will be found in the bodily area to be searched, an "emergency" situation in which there was "no time" to secure a magistrate's warrant and any delay threatened the imminent destruction of relevant evidence and performance of the search in a "reasonable manner" (Schmerber, 384 US at 770-771).[1] We adopted the Schmerber test in More to

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[1] Of course, even if a warrant is issued, the search must be conducted in a reasonable manner. The majority properly acknowledges that it would require "highly unusual facts" (see majority op at 13 n 8) to justify a public visual body cavity search (see e.g. Paulino v State, 924 A2d 308, 319 [Md. 2007] [combined strip and visual body cavity search conducted in well-lit parking lot, where car passengers could observe, unconstitutional because it was "unnecessarily within the public view and thus violative of the Fourth Amendment"]; Campbell v Miller, 499 F3d 711, 719 [7th Cir

(Continued...)

govern "body cavity searches incident to . . . arrest" (More, 97 NY2d at 213-214). Because we did not distinguish between visual and manual body cavity searches in that case, we are now required to determine whether Schmerber should apply to both categories of body cavity searches.

The majority holds that visual body cavity searches are exempt from Schmerber's rule and are subject to the reasonable suspicion standard because it is "reasonable" to distinguish such searches from manual body cavity searches (see majority op at 7-9). This is so, says the majority, because a visual body cavity search "do[es] not create a risk of physical pain or injury" and is therefore somehow less intrusive than "a physical search of an arrestee's body cavity" (see majority op at 8, 10). But, even assuming that that assertion is correct, it is still true that eyes -- as well as fingers and tools -- can intrude unreasonably upon constitutionally protected privacy rights (see Kamins, New York Search & Seizure § 4.01 [1], at 4-3 [2007 ed.] ["Whenever it is determined that an area is one in which an individual has a reasonable expectation of privacy, the invasion of that privacy constitutes a search within the meaning of the Fourth Amendment . . . A search can take a variety of forms -- [including] . . . a visual inspection"]).

(...Continued)

2007] ["Courts across the country are uniform in their condemnation of intrusive searches performed in public"]; see also People v Mitchell, 2 AD3d 145, 147 [1st Dept 2003] ["The strip search of the defendant, in public view . . . was not reasonable"]).

When a law enforcement official peers into the rectum of an arrestee to search for contraband, that visual inspection is clearly an intrusion into the body (see Fuller v M.G. Jewelry, 950 F2d 1437, 1449 [9th Cir 1991] ["Schmerber governs all searches that invade the interior of the body -- whether by a needle that punctures the skin or a visual intrusion into a body cavity"]). The fact that "no touching" (see majority op at 7) occurs is immaterial because the search represents a drastic affront to human dignity and privacy, the very fundamental constitutional interests that Schmerber's rule was designed to protect (see id. ["'The interests in human dignity and privacy' invaded when a public official peers inside a person's body cavity are at least as great as those invaded by a needle piercing the skin. Therefore, a body cavity inspection cannot be justified by a lesser standard than that applied in Schmerber for a blood test"]; cf. United States v Oyekan, 786 F2d 832, 840 n 13 [8th Cir 1986] ["We believe a body cavity search must be conducted consistently with the Schmerber factors, even though such a search does not technically require piercing the skin, because both the degree and kind of intrusion involved are of analogous proportions"]).

Indeed, it is indisputable that visual body cavity searches are degrading, humiliating, and frightening (see Campbell v Miller, 499 F3d 711, 718 [7th Cir 2007], quoting Mary Beth G v Chicago, 723 F2d 1263, 1272 [7th Cir 1983] ["strip searches involving the visual inspection of the anal and genital areas [are] 'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive [and] signif[y] degradation

and submission'"]; State v Clark, 65 Haw 488, 497, 654 P2d 355, 362 [1982] ["It is humiliating and degrading to be forced to totally expose one's self to a total and hostile stranger"]; Bell v Wolfish, 441 US 520, 576-577 [1979] [Marshall, J., dissenting] [visual body cavity searches "represent one of the most grievous offenses against personal dignity and common decency"]; accord More, 97 NY2d at 213 [body cavity searches incident to arrest are "invasive" and "degrading"]). Logically then -- because we adopted the Schmerber test in More -- our state's citizens should be entitled to as much protection from warrantless visual body cavity searches as they are from a common blood drawing procedure that "involves virtually no risk, trauma, or pain" (see Schmerber, 384 US at 771).

I concede that the majority's position is bolstered by the holdings of many federal circuit courts that have applied Bell v Wolfish (441 US 520 [1979]) to permit visual body cavity searches pursuant to a reasonable suspicion standard (see majority op at 7-8). But it is notable that the main factor motivating several of those courts to adopt the Wolfish test -- the need to maintain institutional security -- is wholly lacking support on this record (see Swain v Spinney, 117 F3d 1, 8 [1st Cir 1997] ["[T]he most compelling justification for warrantless strip and visual body cavity searches is institutional security"]; see also Mary Beth G., 723 F2d at 1273; Blackburn v Snow, 771 F2d 556, 564 [1st Cir 1985]). And, as the majority acknowledges, the U.S. Supreme Court has reserved on the issue of whether the fourth amendment permits warrantless strip searches performed incident to

arrest (see Illinois v LaFayette, 462 US 640, 646 n 2 [1983]).

The Ninth Circuit has concluded that visual body cavity searches of arrestees are subject to Schmerber (see Fuller, 950 F2d at 1449). The courts in at least one other state agree (see Hughes v Commonwealth, 31 Va App 447, 460, 524 SE2d 155, 162 [2000] ["Probable cause to believe a suspect possesses drugs, which justifies a search of an individual, does not justify a strip or body cavity search unless the evidence or circumstances specifically provides the officers with a 'clear indication' that the contraband is concealed in a body cavity"]; cf. Commonwealth v Moss, 30 Va App 219, 224-226, 516 SE2d 246, 249-250 [1999] [applying Schmerber test to strip search]). Thus, the judicial consensus on the propriety of visual body cavity searches is far from settled (see LaFave, Search & Seizure: A Treatise on the Fourth Amendment § 5.3 [c], at 167 [4th ed] ["[T]here is still a need to scrutinize closely those searches incident to arrest which involve inspections of or intrusions into the body"]).[2]

In any event, Wolfish should not govern visual body cavity searches incident to arrest (see Fuller,

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[2] In two cases decided after Wolfish, the courts of last resort in Hawaii and Louisiana held that Schmerber applies to body cavity searches conducted incident to arrest (see State v Clark 65 Haw 488, 497, 654 P2d 355, 362 [1982]; State v Fontenot 383 So 2d 365, 367 [La 1980]). Those cases, however, concerned manual body cavity searches and did not express a view on the applicability of Schmerber to visual body cavity searches.

950 F2d at 1448 [absent record evidence that arrestees "ever intermingled with the general jail population . . . the rationale underlying Wolfish . . . -- which only allows strip searches of detainees with less than probable cause where the objective is to discover weapons or contraband -- does not apply to the instant case"]; see also Commonwealth v. Gilmore, 27 Va App 320, 331 n 5, 498 SE2d 464, 469 n 5 [1998] ["The analytical framework set forth in Wolfish is inapplicable . . . [b]ecause a person who is searched incident to arrest is not yet incarcerated, he or she has greater constitutional protection than a pretrial detainee. As such, this case is controlled by the principles set forth in Schmerber"]). Wolfish did not overrule Schmerber. Instead it recognized that the fourth amendment standard of reasonableness is a flexible one that requires:

> "balancing . . . the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted"

(Wolfish, 441 US at 559).

I respectfully submit that -- in the context of visual body cavity searches incident to arrest -- the proper balance of constitutional interests has already been struck -- in Schmerber (see Fuller, 950 F2d at 1448; Hughes, 31 Va App at 460; Gilmore, 27 Va App at 331 n 5). In Wolfish, there was a reason to tip the scales towards the government, namely record evidence that the federal pre-trial detention facility at issue there

was a "unique place fraught with serious security dangers," where "[s]muggling of money, drugs, weapons, and other contraband is all too common an occurrence" (441 US at 559). As the majority admits, however, the record before us contains no evidence of parallel security concerns plaguing the 26th Precinct Stationhouse (see majority op at 9). Instead, the record demonstrates that: at least 12 holding cells, some of which were located 20 feet from the stationhouse desk, were available for searching arrestees, another 14 detention cells were available for "overnight lodging," and that defendant's cohort was searched in a cell separate from him.[3] Thus, the Appellate Division's reliance upon Wolfish is misplaced.

Moreover, the balance struck in Wolfish was predicated on the assumption that "convicted prisoners" and "pre-trial detainees" merely retained "some" fourth amendment rights upon their commitment (see 441 US at 558). Here, in contrast, we deal with an arrestee, who at the time of the search had not yet even been arraigned and who was therefore entitled -- at the very least -- to enjoy greater constitutional protection than a pre-trial detainee, who was remanded to supervision following arraignment, or a convicted prisoner

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[3] Because constitutional search and seizure protections are flexible, I do not foreclose the possibility that a particular stationhouse may experience the same security concerns at issue in Wolfish. If such legitimate concerns caused by, for example, cell overcrowding, were established by record evidence, then those facts could constitute an exigent circumstance under the Schmerber test.

(Gilmore, 27 Va App 331 n 5; cf. Block v Rutherford, 468 US 576, 583 [1984] ["The very fact of nonrelease pending trial . . . is a significant factor bearing on the security measures that are imperative to the proper administration of a detention facility"]; People ex rel. Maxian v Brown, 77 NY2d 422, 427 [1991] [noting that "the deprivation entailed by prearraignment detention is very great [and is] . . . one as to which no predicate is established in advance and, indeed, which may ultimately be found to have been unwarranted"] [internal quotation marks omitted]; State v Bayaoa, 66 Haw 21, 25 n 2, 656 P2d 1330, 1333 n2 [1982] ["at least with regard to the fourth amendment, the rights of persons not yet convicted of crimes must be more closely scrutinized than the rights of prisoners"]).

Application of the reasonable suspicion standard in this case is also particularly inappropriate because we have stated that that standard applies to searches that are "uniquely discriminate" and "nonintrusive" (see e.g. People v Dunn, 77 NY2d 19, 26 [1990] [canine sniff search of apartment hallway subject to reasonable suspicion standard because "[i]t does not entail entry into the premises or exposure of one's personal effects to the police"]; see also People v Cantor, 36 NY2d 106, 112-113 [1975] [reasonable suspicion standard applies to authority of police officers to stop and inquire of citizens in public place]). And the U.S. Supreme Court has applied the standard to the detention of suspected smugglers at national borders, where the interests of the individual are greatly outweighed by those of the government (United States v Montoya de Hernandez, 473 US

531, 541-542 [1985]). Even in that context, however, the Court made clear that "[t]he 'reasonable suspicion' standard" is intended to "effect[] a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause" (id. at 541). A visual body cavity search, however, cannot be characterized as a "limited intrusion."

Nor can visual body cavity searches be justified under our precedents recognizing an officer's right to conduct a limited search incident to arrest. Such a search is constitutionally permissible based upon two exigent circumstances: the need to protect the safety of the arresting officer and the need to prevent the destruction of evidence (see People v Evans, 43 NY2d 160, 165 [1977]; Chimel v California, 395 US 752, 763 [1969]). We have explained that such searches are permitted because they represent "de minimis intrusions" when compared with the loss of liberty occasioned by the arrest that preceded them (see People v De Santis, 46 NY2d 82, 87 [1978], overruled on other grounds, People v Belton, 55 NY2d 49 [1982]; cf. People v Perel, 34 NY2d 462, 467 [1974] [explaining, in context of inventory search, that "[g]iven the nature of the gross intrusion by detention of the person it is reasonable to conduct a less intrusive search of his person and the possessions he carried with him"]). Thus, a warrantless search is not justified when "the intrusion required for [it] is of a greater magnitude than the gross personal intrusion of the arrest and the personal search incident to it" (see Perel, 34 NY2d at 468). Here, the visual body cavity search

was unjustified because the inspection of defendant's highly private and intimate areas greatly exceeded the magnitude of the intrusion occasioned by his arrest and the pat-down search incident to it.

Most importantly, given "our strong preference for warrants" (see People v Hanlon, 36 NY2d 549, 558-559 [1975]), we must identify reasons for dispensing with the warrant requirement in particular cases (see Brigham City, Utah v Stuart, 547 US 398, 403 [2006], quoting Mincey v Arizona, 437 US 385, 393-394 [1978] ["[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment"]). Critically, the ease of obtaining evidence of criminal conduct is not a relevant consideration in this inquiry (see Mincey, 437 US at 393 ["[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investigation of crime would always be simplified if warrants were unnecessary"] [internal citation omitted]; see also Schmerber, 384 US at 770 ["In the absence of a clear indication that in fact such evidence will be found . . . fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search"]; cf. People v Gokey, 60 NY2d 309, 312-313 [1983] [lack of "exigent circumstances" rendered search of bag impermissible where defendant was handcuffed and "[the] police officers' interest in the bag focused solely on the possibility that it

contained marihuana"]). Exigencies threatening officer safety or the imminent destruction of evidence are valid justifications for dispensing with the warrant requirement (see e.g. Evans, 43 NY2d at 165). But once an arrest has occurred, these important factors lose much of their force (see e.g. Gokey, 60 NY2d at 313-314 [warrantless search impermissible where defendant was handcuffed and surrounded by officers because the "police . . . did not fear for their safety, and because they could not have reasonably believed that the search of the bag was necessary to preserve any evidence"]).

Therefore, in the context of a stationhouse visual body cavity search, where an arrestee can be segregated, monitored and secured pending the issuance of a warrant and there is no record evidence of any exigency threatening safety and security or the imminent destruction of evidence, the police must obtain a warrant or proceed under Schmerber's clear indication test (see Clark, 654 P2d at 362, citing Fontenot, 383 So 2d at 367 ["[T]he police could have detained and watched defendant . . . so as to prevent destruction of evidence during the short delay caused by getting a warrant. This burden on the police does not raise this situation to the level of an emergency"]). Any exception to this rule would authorize warrantless visual body cavity searches solely to secure evidence of criminality. That should not be permitted.

The probable cause standard could be met in many cases where visual body cavity searches would aid law enforcement (see CPL 70.10 [2]). Like the reasonable suspicion standard, its contours are equally clear:

> "the information [contained in the warrant application] must be sufficient to warrant a person of reasonable caution in the belief that . . . evidence of a crime will be found in a particular place"

(People v P. J. Video, Inc., 68 NY2d 296, 300 [1986]).

In evaluating the warrant application, the magistrate must consider "all aspects of the information supporting [it]," including "the experience and expertise of the officers involved" and "the nature of the crime and the exigencies, if any, involved" (see id. at 306). Under this standard, a magistrate could certainly approve a visual body cavity search of a narcotics arrestee.

Indeed, several facts could support a proper warrant application, including officers witnessing a defendant secrete narcotics, suspicious movements consistent with storage of a foreign substance in a body cavity, defendants' admissions, and reliable information obtained from police sources (see People v Jones, 3 Misc 3d 481, 483 n 2, 485-486 [Sup Ct, Bronx County 2004] [police had "probable cause" where observing officer witnessed arrestee "put the drugs down the back of his pants"]; People v Perry, 800 NYS2d 354, 354 & n 5 [Sup Ct, Queens County 2005] [police had "clear indication" that arrestee had secreted drugs in rectum where, after being segregated in a cell pending issuance of warrant, he behaved erratically "and was observed wiggling his body [and] reaching into the back of his pants and putting his hand to his mouth"]; cf. People v Kelley, 306 AD2d 699, 700 [3d Dept 2003]

[factors that courts consider to determine reasonableness of strip searches include

> "defendant's excessive nervousness, unusual conduct, information showing pertinent criminal propensities, informant's tips, loose-fitting or bulky clothing, an itinerary suggestive of wrongdoing, incriminating matter discovered during a less intrusive search, lack of employment, indications of drug addiction, information derived from others arrested or searched contemporaneously, and evasive or contradictory answers to questions"]).

In any event, had the police monitored defendant in a holding cell, additional facts may have come to light that could have permitted a visual body cavity search under the Schmerber test (see Perry, 800 NYS2d at 354 [after police attempted to obtain warrant, exigent circumstances arose when they observed defendant put "his hand down the rear of his underwear in the area of his anus" and then begin to eat something]; cf. People v Barnville, 31 AD3d 271, 272-273 [1st Dept 2006] [because of

> "the trained, experienced officer's observation of defendant, at a notorious drug location, retrieving an item from his buttocks area and exchanging it for money from a person found in possession of drugs minutes later, the fruitless search of defendant's outer garments, and the knowledge that drug dealers often store drugs within their buttocks or rectum -- there was sufficient evidence to support not only probable cause to arrest for a drug sale, but an objective, particularized, reasonable belief that

defendant was secreting contraband in the area of his buttocks"]).

That there are any number of factual situations in which probable cause to conduct a visual body cavity search could be satisfied underscores the fact that "[i]n dealing with probable cause . . . we deal with probabilities" (see Brinegar v United States, 338 US 160, 175 [1949]). But when the assessment of those probabilities can lead to an intrusion upon human dignity and privacy as grievous and degrading as a visual body cavity search, then such assessment -- absent exigent circumstances not present here -- should be made by a neutral and detached magistrate (see Hanlon, 36 NY2d at 558 [warrant requirement "is designed to interpose the detached and independent judgment of a neutral Magistrate between the interested viewpoint of those engaged in ferreting out crime and the potential encroachments on the sanctity and privacy of the individual"]).

In conclusion, I concur in the result that the majority reaches today, but I cannot join in the full breadth of its reasoning. The fundamental constitutional interests of human dignity and bodily integrity are not only implicated when intimate bodily areas are touched. A visual intrusion into a body cavity is an "intrusion beyond the body's surface" and thus, the Schmerber test must apply to such searches as well as manual body cavity searches. I would therefore grant defendant's motion to suppress the drugs and dismiss the indictment.

People v Azim Hall
No. 29

SMITH, J.(dissenting in part) :

I agree that, for the reasons explained in Judge Graffeo's opinion, the visual search did not violate defendant's constitutional rights. I think the seizure of the contraband was lawful also, and therefore I would affirm defendant's conviction.

The visual search, which we today hold valid, led Officers Burnes and Spiegel to observe a string hanging from defendant's rectum. The record shows that Burnes twice ordered defendant to remove the string, and warned him that if defendant did not do so, Burnes would do it himself. Defendant remained motionless. Burnes and Spiegel then held defendant's arms and forced him into a bent position. Burnes pulled the string, and a plastic bag containing rocks of crack cocaine came out "easily." There is no evidence that either officer put a hand or implement in defendant's body, or even touched him below the waist.

The majority holds that, when defendant refused to cooperate, the officers had to leave the contraband where it was until they got a search warrant. In that situation, getting the warrant seems to me a pointless exercise, and I do not believe the State or Federal Constitution requires it.

The general rule, of course, is that a person arrested can be searched without a warrant. In Schmerber v California (384 US 757 [1966]), the Supreme Court established an exception for searches that intrude into the human body.

"Search warrants," the Court said in Schmerber, "are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned" (384 US at 770). I find Schmerber inapplicable here, for the simple reason that no one intruded into defendant's body. There is no evidence that any hand or implement was inserted, or that the officers' actions had any significant internal effect on defendant. All Burnes did was pull on a plainly visible string, causing the contraband to emerge with no difficulty. There is no claim that this action caused defendant any pain, or put him at risk of injury. The removal of the contraband in this case seems to me a lesser violation of privacy than the lawful search that led to its discovery.

The majority relies on People v More (97 NY2d 209 [2002]) to hold that Schmerber governs this case. It is true that we applied Schmerber in More, and that we held the removal of drugs from defendant in that case unconstitutional, but the facts in More were different from the facts here.

Our statement of the central facts in More is brief: "Defendant initially cooperated by taking off most of his clothes, but at some point he protested and scuffled with the officers. During the search, which took place in a bedroom, the police removed a plastic bag, an outer portion of which they saw protruding from defendant's rectum" (97 NY2d at 212). Defendant's brief in our Court, however, was more detailed and less delicate:

> "Officer Schoonmaker grabbed Appellant and called for help, claiming that he saw a piece of cellophane protruding from

> appellant's anus. Appellant was immediately surrounded by police officers. A struggle ensued as the officers attempted to reach into the appellant's rectum. Appellant resisted the assault for three or four minutes in spite of the fact that 5 or 6 officers were trying to wrestle him to the ground. Eventually, he was incapacitated by the police. One officer was holding each leg, one officer was lying on top of his head and one officer was holding each of his arms. The defendant was handcuffed. His face was forced into the floor and his buttocks forced up to the ceiling. At this point, as Appellant continued to struggle, an unknown officer called for a flashlight. Another unknown officer came in and shined a flashlight into the rectum of the Appellant. Detective Sergeant Wilson put on a rubber glove and proceeded to enter the rectum of the Appellant. He groped and probed extensively. As it turned out, the baggie that Officer Schoonmaker had earlier testified was protruding from the appellant, was, instead, other officers testified, so far inside the appellant that it was barely visible to the naked eye and was very difficult to remove. So much force was used to accomplish the extraction that the baggie was covered with blood and human tissue."

(Appellant's brief, People v More at 5-6; record references omitted.)

The People's brief in More did not challenge this summary of the way the evidence was retrieved. In light of that, I find it unsurprising that our opinion in More simply assumes, without discussion, that the search involved an intrusion "beyond the body's surface" (97 NY2d at 212) and that Schmerber therefore applied. There is another

important difference between the More facts and ours: the officers in More did not have reason to suspect, before performing a visual body cavity search, that the defendant was concealing drugs inside his body. He had been arrested when police officers found him sitting near a crack pipe and a small piece of crack cocaine. Our opinion in More seems to reflect the belief -- well justified by the record in that case -- that even the visual body cavity search was unlawful. Among the authorities we relied on were Mary Beth G. v City of Chicago (723 F2d 1263 [7th Cir 1983]) and Arruda v Fair (710 F2d 886 [1st Cir], cert denied 464 US 999 [1983]), both of which involved only visual searches (see 97 NY2d at 213).

We should not treat More as being conclusive on an issue not presented or not discussed in that case: whether, when an object protruding from a body cavity is found during a lawful search, the removal of that object without intrusion into the body requires a warrant under Schmerber. No other New York case decides the question, and decisions from other jurisdictions are of limited help, though several give some indirect support to the People's position here (see United States v Himmelwright, 551 F2d 991 [5th Cir 1977] [removal during border search not unlawful]; State v Jones, 76 Wash App 592, 887 P2d 461 [1995] [removal not a body cavity search under State statutes]; State v Nieves, 383 Md 573, 861 A2d 62 [2004] [search held unlawful for lack of reasonable suspicion, but court concluded that removal of protruding bags was not "a physical body cavity search"]). In a case almost identical to ours, State v Barnes (215 Ariz 279, 159 P3d 589 [2007]), an

intermediate appellate court in Arizona divided 2 to 1 in the defendant's favor.

I agree with Judge Espinosa, dissenting in Barnes, who said: "It makes little sense . . . to require officers to obtain a warrant in cases such as this, where contraband is visible between the cheeks of the buttocks and may be retrieved easily, without harm to the individual" (215 Ariz at 285, 159 P3d at 595). I do not see why it is unreasonable for the officers to take, with minimal force, what they have already lawfully seen (cf. Horton v California, 496 US 128 [1990] [lawful to seize object in plain view]). The majority's contrary holding will, I fear, add unnecessarily to the many problems faced by police officers trying to make headway against street drug dealers.

Accordingly, I would affirm defendant's conviction.

* *

Order reversed, defendant's motion to suppress granted to the extent of suppressing the drugs recovered and indictment dismissed. Opinion by Judge Graffeo. Chief Judge Kaye concurs.

Judge Ciparick concurs in result in an opinion in which Judge Jones concurs. Judge Smith dissents and votes to affirm in an opinion in which Judges Read and Pigott concur.

Decided March 25, 2008

People v Hall
2007 NY Slip Op 01015 [39 AD3d 100]
February 6, 2007
Saxe, J.
Appellate Division, First Department
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{**39 AD3d at 101}

OPINION OF THE COURT
Saxe, J.

On this appeal by the People from an order granting suppression of physical evidence, we are asked to consider whether the police violated the Fourth Amendment's prohibition against [*2]unreasonable searches and seizures by extracting a small bag secreted within defendant's rectum. This took place at the police precinct, following defendant's arrest for criminal sale of a controlled substance in the third degree, after the police observed a string protruding from his rectum in the course of conducting a strip search and visual body cavity inspection.

At the suppression hearing the People offered the testimony of Police Lieutenant Stephen Burnes as to his observation of a drug sale by defendant, and his subsequent observations during a search of defendant at the precinct after his arrest. Defendant offered the additional testimony of Police Officer Frederick Spiegel, who conducted the search of defendant.

Lieutenant Burnes stated that at approximately 8:30 p.m. on February 10, 2005, he was stationed on a rooftop at 128th Street and St. Nicholas Terrace in Manhattan. Using binoculars, Burnes observed Ross Meyers, whom he recognized from previous interactions, speaking with two men at the intersection, after which both men gave money to Meyers. Meyers then walked over to defendant, who was standing near a bodega on the corner. Meyers and defendant had a short conversation and then went into the bodega, with Meyers staying near the front door and defendant going to the back. Defendant then came over from the back of the bodega to where Meyers was standing and put something into Meyers's hand. Meyers walked outside, went over to the two men on the sidewalk, and held his hand open so that Burnes could see that he was holding small white objects, which the two men took from Meyers's hand. The two men went off in different directions. Meyers and defendant each stayed in the area for a few minutes more and then left separately. A field team picked up Meyers and defendant, and they were taken into police custody.

Officer Spiegel brought defendant to a detention cell and conducted a strip search of him. Once defendant was completely disrobed, Spiegel

asked him to squat by bending at the knees. As the defendant did so, Spiegel saw a string hanging from defendant's rectum and called Burnes into the cell. Burnes entered the cell and, in a loud voice, instructed defendant to remove the string. When defendant would not comply, Burnes and Spiegel grabbed both of defendant's arms and brought him to the ground so that he was in a bent-over position; Burnes then pulled the string out of the defendant's rectum, recovering a plastic bag containing rocks of crack wrapped in plastic wrap.

Burnes explained that the police strip-searched defendant in this manner because in the drug possession cases he had handled, "a good majority" of the people arrested "usually" place drugs between their buttocks. Burnes added that in at least one out of two drug arrests, the suspects had hidden drugs in such a manner. Officer Spiegel stated that a strip search was necessary because people who sold drugs in the four-block area where defendant was arrested generally carried very small pieces of crack wrapped in plastic and secreted down their pants or inside their jackets and pockets.

The hearing court, finding that both Burnes and Spiegel were credible witnesses, termed the police conduct a body cavity search unjustified by exigent circumstances, citing *Schmerber v California* (384 US 757 [1966]) and *People v More* (97 NY2d 209 [2002]), and accordingly, suppressed the resulting evidence.

Upon the facts as found by the hearing court, we disagree with its analysis, and hold that [*3]it was error to suppress the evidence seized from

defendant's person. The actions taken by the police were justified and reasonable.

In *Schmerber*, the Supreme Court deemed it a Fourth Amendment violation to forcibly take a blood sample without a warrant following the defendant's involvement in an automobile collision, in order to determine whether he was driving while intoxicated at the time of the accident. The Court said:

> "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a *clear indication* that in fact such evidence will be found, these [**39 AD3d at 103] fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search."

(384 US at 769-770 [emphasis added].)

The term "clear indication" was clarified, in *United States v Montoya de Hernandez* (473 US 531, 540 [1985]), as necessitating a "particularized suspicion" that the evidence "might be found within the body of the individual."

While the foregoing cases focused on police intrusions *within* the suspect's body, the Supreme Court, in *Bell v Wolfish* (441 US 520 [1979]), considered the constitutionality of a blanket policy requiring *visual* body cavity searches of all pretrial detainees being housed in a correctional facility after seeing visitors. The Court held that the reasonableness of such visual body cavity searches must be determined by considering (1) the scope of the intrusion, (2) the manner in which the search is conducted, (3) the justification for initiating the

search, and (4) the place in which the search is conducted (*id.* at 559). It concluded that the correctional facility's legitimate security interest in preventing the smuggling in of weapons, money, drugs and other contraband outweighed the intrusion of a visual body cavity search when carried out reasonably, *even absent probable cause, particularized suspicion or clear indication* (*id.* at 560).

A ruling applicable to incarcerated jail inmates is not automatically applicable to those newly arrested. The United States Supreme Court has not yet specifically considered the circumstances under which a strip search incident to arrest is justified (*see Sarnicola v County of Westchester*, 229 F Supp 2d 259, 269 [SD NY 2002], citing *Illinois v Lafayette*, 462 US 640 [1983]). In *Weber v Dell* (804 F2d 796 [2d Cir 1986], *cert denied sub nom. County of Monroe v Weber*, 483 US 1020 [1987]), the court considered a challenge to a blanket policy of conducting a strip search of persons arrested for misdemeanors, holding such a search unlawful unless there is a "reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest" (*id.* at 802; *see also Shain v Ellison*, 273 F3d 56 [2d Cir 2001], *cert denied sub nom. Nassau County v Shain*, 537 US 1083 [2002]). In this state, that rule has been applied by the Second Department to reject as illegal a strip search incident to arrest based upon the arresting officer's observation of the individual's removal of a small [**39 AD3d at 104] bag of marijuana from his

boot (*see People v Manley*, 13 AD3d 653 [2004], *lv denied* 4 NY3d 833 [2005]).

The discussion in *Weber v Dell* has not yet been applied to any policy to strip-search individuals arrested for felonies. The mere fact that the charged crime is a felony rather than a [*4]misdemeanor might not alone suffice as a reason to permit a blanket policy allowing strip searches, absent some particularized reasonable suspicion (*see Sarnicola*, 229 F Supp 2d at 270; *Murcia v County of Orange*, 226 F Supp 2d 489 [SD NY 2002]). However, the rule enunciated in *Weber* logically applies equally well to felony arrests, and bears repeating: a strip search of a person arrested for a felony is lawful where there is a "reasonable suspicion that the arrestee is concealing weapons or other contraband *based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest*" (804 F2d at 802 [emphasis added]).

It is, of course, important to consider *People v More* (97 NY2d 209 [2002], *supra*), which involved a strip search in some ways similar to the one under scrutiny on this appeal. In *More*, police officers entered an apartment with the tenant's permission, having been informed by the tenant that individuals in the apartment were cutting cocaine for sale and that one of them was wanted on an arrest warrant for assaulting a police officer. One detective observed the defendant sitting on a couch with a woman on his lap; a crack pipe and a white rock-like substance the detective believed to be crack cocaine were on a nearby table. He placed the defendant and the woman under arrest, handcuffed them and patted them down. He then

conducted a strip search of the defendant in a bedroom, over the defendant's protests. During the search, the police observed an outer portion of a plastic bag protruding from the defendant's rectum. They removed the bag, which contained several individually wrapped pieces of white rock-like substance later determined to contain cocaine (*id.* at 212).

The Court of Appeals, observing that body cavity searches are degrading and at least as intrusive as the forced submission to a blood test considered in *Schmerber*, concluded that the search of the defendant was unreasonable under those circumstances, explaining that there was no apparent exigency to justify dispensing with the warrant requirement (97 NY2d at 214). Importantly for our discussion, however, the *More* court noted that "this case does not present the occasion for us to rule on the validity of body cavity searches conducted at the station house, detention centers or correctional facilities" (*id.* at 214 n).{**39 AD3d at 105}

Although the *More* court did not specifically discuss the scope, manner, place and justification factors listed in *Bell v Wolfish* (441 US at 559), it is noteworthy that a weighing of those considerations also clearly supports the Court's disapproval of the police conduct under the circumstances presented in *More*. The search was, as the Court observed, a degrading procedure, at least as intrusive as the blood test considered in *Schmerber*; it was unnecessarily conducted outside the station house; and the defendant had not been observed selling or even handling drugs, but it had merely been

observed that a small rock of crack cocaine and a pipe were sitting on a nearby table.

This Court's decision in *People v Mitchell* (2 AD3d 145 [2003]) helps illustrate the important distinction between *More* and the present case, particularly with regard to the location of the search. In *Mitchell*, while the police had probable cause to arrest the defendant for a drug sale, the strip search they conducted *on a public street* was held to be unjustified: "a strip search, conducted in a *public place*, . . . is not justified or reasonable absent the most compelling [*5]circumstances, that is, circumstances that pose potentially serious risks to the arresting officer or others in the vicinity" (*id.* at 148).

In *Mitchell*, this Court applied the standard enunciated in *Bell v Wolfish*, under which the reasonableness of searches must be determined by considering (1) the scope of the intrusion, (2) the manner in which the search is conducted, (3) the justification for initiating the search, and (4) the place in which the search is conducted (*see* 441 US at 559). Applying those criteria to the particular facts and circumstances of this case, the visual body cavity search initially conducted here was justified and reasonable. While the scope of the intrusion is substantial in view of the degrading nature of the procedure, the manner and place of the search were reasonable, and, importantly, the visual body cavity search procedure was justified by the facts known to the police, including their experiences with the common practices of drug sellers in the neighborhood, and the officer's observation of defendant selling drugs, packaged in small packets, during which the seller had to

temporarily retreat to an unseen spot prior to completing the transaction in order to retrieve the goods he sold.

As we observed in *Mitchell* (2 AD3d at 148), some courts have applied the "reasonable suspicion" standard enunciated in *Weber v Dell* to station house strip searches incident to arrest, requiring "reasonable suspicion that the arrestee is concealing{**39 AD3d at 106} a weapon or other contraband." We need do no more here than note that even if that standard were determined to be applicable in this context, it was satisfied by the evidence here.

Although an even stronger basis for such a search was established in *People v Barnville* (31 AD3d 271 [2006], *lv dismissed* 7 NY3d 809 [2006]), where the police observed the defendant actually retrieving an item for sale from within his pants, the predicate for a station house strip search was established here. Finally, the observation of the protruding string, during the course of the procedure, justified the immediate actions taken to physically retrieve the secreted narcotics.

Accordingly, the orders of the Supreme Court, New York County (Bruce Allen, J.), entered (1) on or about August 4, 2005, which, after a *Mapp* hearing, granted defendant's motion insofar as to suppress the physical evidence seized from him at the time of his arrest, and (2) on or about September 9, 2005, which dismissed the indictment, should be reversed, on the law, the motion denied and the indictment reinstated. Tom, J.P., Marlow, McGuire and Malone, JJ., concur.

Orders, Supreme Court, New York County, entered on or about August 4, 2005, and September 9, 2005, reversed, on the law, defendant's motion for suppression denied, and the indictment reinstated.

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

v.

AZIM HALL,
Appellant.

Ind. No. 730/2005

For the People: Ana Kang.
For the Defendant: Alexandra Bonacarti

JUSTICE BRUCE ALLEN:

A *Mapp/Wade* hearing was held before me on June 28 and July 6, 2005. Lieutenant Stephen Burns of the New York City Police Department Testified for the People. The defense called Police Officer Frederick Spiegel. I found each to be credible.

Findings of Fact

Lieutenant Burns has been a police officer for 20 years. He has made more than 1,000 drug arrests. On February 10, 2005, at approximately 8:30 p.m., Lt. Burns (then a sergeant) was in an observation post on a roof across the street from 128th Street and St. Nicholas Terrace. He saw a man he recognized from the neighborhood as Ross Meyers outside a bodega, drinking a beer. A second man, whom Burns identified in court as the defendant, was nearby. Two men walked up to

Meyers. They spoke with him, then handed him money. Meyers gave the money to the defendant, who then went into the bodega. After a few minutes, the defendant came out of the bodega and handed something to Meyers. Meyers walked over to the two other men and opened his hand. When he did, Burns was able to observe that he held white objects. Meyers gave the objects to the two men, who then left. Burns radioed the field team. Officer Spiegel arrested Meyers. Other officers arrested the defendant. The buyers were not apprehended.

At the stationhouse, Burns identified the defendant as the man he had seen with Meyers. Officer Spiegel searched the defendant at the desk, and recovered several items. The defendant was then taken to the cell block for a strip search. The officers testified that strip searches were conducted in all drug arrests, because defendants often hid drugs in their buttocks and rectums. Lieutenant Burns testified that drugs were found so concealed in approximately half of all cases. Officer Spiegel began the search by asking the defendant to disrobe. The defendant complied. Spiegel then ordered the defendant to bend over. When the defendant did so, Spiegel observed a white string, about three inches long, protruding from the defendant's rectum. Spiegel pointed out the string to Burns. Both officers believed that the string led to a drug stash. Burns directed the defendant to "take it out". The defendant refused. Spiegel then held the defendant around the waist while Burns pulled the string. The "string" was attached to a small plastic bag hidden in the defendant's rectum.

By pulling the string, Burns was able to remove the bag. The bag contained crack cocaine.

Conclusions of Law

The defendant challenges the recovery of the drugs from his rectum. In determining the legality of the recovery of evidence from a suspect's body, the law makes a distinction between a "strip search" and a "body cavity search". Here, the officers characterized their search of the defendant as a strip search. However, by visually inspecting the defendant's anus and then removing the bag of cocaine from his rectum, the officers were in fact conducting a body cavity search. People v. More, 97 NY2d 209; People v. Barnsville, 7 Misc.3d 688 (Sup Ct., Bronx County, 2005); N.G. v. Connecticut, 382 F3d 225 (2nd Cir.2004).

In the leading case of People v. More, the Court of Appeals held that a body cavity search which took place in an apartment incident to an arrest violated the Fourth Amendment. The court explained that the search in question ran afoul of the exigent circumstance test set forth in Schmerber v. California, 384 US 757. The court in More was careful to note, however, that it was not ruling on the validity of body cavity searches which take place at stationhouses or prisons.

The actual search in More was similar to that carried out here. The defendant in More was arrested for possessing drugs in his apartment. Officers took him to the bedroom and forced him to disrobe. As here, the officers saw a portion of a plastic bag protruding from the defendant's rectum. They removed the bag, which contained cocaine. In

finding that the body cavity search failed to meet the Schmerber test, the court in More stated:

Notably, no police officer testified that, despite the available means of incapacitating defendant and keeping him under full surveillance, an immediate body cavity search was necessary to prevent his access to a weapon or prevent the disposing of drugs. Nor was there any evidence the police were concerned that the drugs - which were wrapped in plastic - could have been absorbed into defendant's body. The absence of exigent circumstances dictates the conclusion that the body cavity search here was unreasonable.

Here, too, there was no testimony at the hearing about weapons, disposal of drugs or health concerns. To the contrary, Lieutenant Burns candidly admitted that the purpose of the search was essentially the same as the one conducted in More: to gather evidence of the suspected crime. In his view, he was conducting a standard strip search of a drug arrestee. It follows, therefore, that the warrantless body cavity search here also fails to pass constitutional muster under More.

But the search in this case took place in a stationhouse rather than an apartment. And as noted, the court in More expressly left open the question of body cavity searches in the stationhouse setting. Clearly, a body cavity search at a stationhouse or a prison might be carried out for reasons quite different than such a search at an apartment. These institutions have safety and security issues as well as health concerns for the whole population of detainees. But again, there was no testimony at this hearing that the search was conducted for any such purposes. The officers did

not testify that a suspect secreting drugs in his buttocks or rectum posed a safety threat to the institution, or that there was any danger of dispersal of the drugs to other arrestees. Nor did the officers claim that the search was conducted pursuant to a policy regarding drug felons.

Thus, the fact that this search took place in the stationhouse is no reason to treat it any differently from any other search incident to arrest. As such, it is subject to the same legal analysis as that undertaken by the court in More. Normally, the need to prevent a person lawfully arrested from destroying evidence of the crime is considered sufficient exigent circumstances to allow an officer to search the person arrested and the area within the person's immediate control without the need for a warrant. People v. Belton, 55 NY2d 49; People v. Smith, 59 NY2d 454. But as More made clear, a much greater showing of exigent circumstances is required to allow a warrantless body cavity search incident to an arrest.

The search in this case might be considered somewhat less intrusive than the one in More since there is always some loss in the expectation of privacy once an arrested drug suspect is brought from the scene of the arrest to the stationhouse. See People v. Mitchell, 2 AD3d 145 (1st Dept 2003). However, the loss of privacy is not complete. In More, the court noted that a body cavity search is at least as intrusive as the drawing of a defendant's blood. Blood cannot be drawn without a warrant simply because a defendant is being held in a stationhouse.

Further, there is even less of a showing of exigent circumstances here than in More. Again,

there was no testimony that the officers here faced any heightened exigencies in terms of security, safety, or the threatened destruction of evidence than did the officers in More. Certainly the ability of the officers to isolate and incapacitate the defendant and to keep him under full surveillance was greater than was the case in More.

Accordingly, the motion to suppress is granted with respect to the drugs recovered from the defendant's rectum. In all other respects, the motion to suppress is denied.

August 4, 2005

BRUCE ALLEN

03

FILED:
JUL 16 2008

No. 07-1568

IN THE
SUPREME COURT OF THE UNITED STATES

NEW YORK,

Petitioner,

-against-

AZIM HALL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Should this Court grant certiorari where the State won on the primary issue which it asks this Court to review. Further, should this Court grant certiorari where the parties do not dispute the constitutionality of warrantless strip searches, and there is virtually no conflict among the lower courts regarding the constitutionality of visual body cavity searches conducted incident to arrest, or the appropriate standard that applies to such searches?

2. Should this Court should grant certiorari where the holding of the New York Court of Appeals, that the Fourth Amendment and Schmerber v. California require the police to obtain a warrant before removing an item protruding from but concealed within a defendant's rectum, does not conflict with any direct holding of a state court of last resort or of a United States court of appeals?

3. Should this Court grant certiorari where the parties agree that the Fourth Amendment requires the police to obtain a warrant before conducting a body cavity search, and the New York Court of Appeals correctly decided that removing a concealed but protruding item from an arrestee's body cavity constitutes a body cavity search in light of heightened privacy, safety, and health concerns?

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IN THE
SUPREME COURT OF THE UNITED STATES

NEW YORK,

Petitioner,

-against-

AZIM HALL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Azim Hall, by counsel Robert S. Dean and Barbara Zolot, respectfully requests the Court to deny the Petition for Writ of Certiorari filed by the State of New York as there has been no showing that the issues presented merit consideration by the Court.

OPINIONS BELOW

The relevant state court opinions are reproduced in Petitioner's Appendix in Support of Petition for a Writ of Certiorari, cited herein as "State App."

INTRODUCTION/COUNTER STATEMENT

Following his arrest for participating in an alleged drug sale, respondent was taken to a precinct cell, where he was ordered to remove his clothes, then bend over

for a visual body cavity inspection (State App. at 3a). Two police officers, Burnes and Spiegel, observed a string hanging from respondent's rectum, that they believed was attached to a package of drugs secreted inside respondent's body (State App. at 3a). After respondent refused to remove the object, Spiegel held respondent around the waist while Burnes pulled on the string, removing a plastic bag containing crack cocaine from within respondent's rectum (State App. at 3a, 46a).

Respondent was indicted on two felony drug possession counts. He moved to suppress the drugs, which the court granted following an evidentiary hearing. The hearing court held that "by visually inspecting the defendant's anus and then removing the bag of cocaine from his rectum, the officers were in fact conducting a body cavity search." (State App. at 47a). Accordingly, applying the test in Schmerber v. California, 384 U.S. 757 (1966), which the New York Court of Appeals had previously applied in considering a similar search, the hearing court held that a warrant was required to conduct the search because the police lacked exigent circumstances (State App. at 47a-50a). Appeals to the intermediate appellate court (by the State) and to the New York Court of Appeals (by respondent) followed.

At each stage of the appeal, the State argued that the Fourth Amendment permits warrantless visual body cavity searches for the purpose of obtaining concealed evidence. Specifically, the State argued at length in the New York Court of Appeals that institutional security was not the only justification for warrantless visual body cavity searches, and that such searches were allowed to find and

preserve concealed evidence. The State maintained that respondent's arrest alone should justify the search, but also argued that application of the four-prong reasonableness test this Court formulated in Bell v. Wolfish, 441 U.S. 520 (1979), as well as reasonable suspicion, justified the search. In its efforts to persuade the New York Court of Appeals that the Fourth Amendment permitted warrantless visual body cavity searches incident to arrest, the State represented that "the vast majority of courts have declined to draw a distinction between strip and visual body cavity searches of arrestees conducted for the purpose of institutional security and those same searches conducted for the express purpose of discovering and preserving evidence of a crime," and that "courts nationwide have ruled that warrantless strip and visual body cavity searches incident to arrest, conducted for the purpose of discovering and preserving evidence of the crime, are lawful as long as they are reasonable."[1]

A five-judge majority of the New York Court of Appeals agreed with the State that a standard "less stringent than Schmerber" applied to "visual cavity inspections of arrestees" (State App. at 7a), and further agreed with the State that warrantless visual body cavity searches were permissible not only to maintain institutional security, but also "for the purpose of preserving evidence" (State App. at 8a). The court thus held that a visual body cavity search may proceed "when the police have a specific, articulable factual basis supporting a reasonable suspicion to

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[1] Brief for the State in the New York Court of Appeals, at 35. Respondent can provide this Court with a copy of the State's brief upon request.

believe the arrestee secreted evidence inside a body cavity," and the search is reasonably conducted (State App. at 9a).

A four-judge majority of the court, however, agreed with respondent that the removal of the bag of drugs by pulling the string was a more invasive manual body cavity search that gave rise to "heightened privacy and health concerns," thus requiring the police to obtain a warrant absent exigent circumstances (State App. at 8a, 10a). As the court held, "Under our decision in More, the removal of an object protruding from a body cavity, regardless of whether any insertion into the body cavity is necessary, is subject to the Schmerber rule and cannot be accomplished without a warrant unless exigent circumstances reasonably prevent the police from seeking prior judicial authorization." (State App. at 11a). In People v. More, 97 N.Y.2d 209 (2002), the police had also forcibly removed a plastic bag protruding from the defendant's rectum, and the New York Court of Appeals held that "a search of this nature was 'at least as intrusive as [the] blood test procedures' in Schmerber (id. at 213)." (State App. at 9a-10a)

The State fails to present any compelling reason why its request for a writ of certiorari should be granted. See Supreme Court Rule 10 ("Review on a writ of certiorari is not a matter of right but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.") The State primarily claims that the Court should grant certiorari to resolve whether the Fourth Amendment permits warrantless strip and visual body cavity searches incident to arrest. But, as discussed further below, the State won on that issue, making this case an

inappropriate candidate for certiorari. The New York Court of Appeals agreed with the State that warrantless visual body cavity searches incident to arrest may be reasonable. The Court should not exercise its discretion to grant certiorari on an issue where the party seeking review has no incentive to upset the state court's holding in its favor — even assuming there was a conflict for the Court to resolve. Moreover, while the State complains about a nationwide split concerning the appropriate standard for such searches, the reasonable suspicion standard adopted by the New York Court of Appeals is the same standard applied by the majority of state and federal courts, and there is no practical difference between reasonable suspicion and Bell v. Wolfish's reasonableness test.

The State's secondary basis for seeking certiorari is its claim that Schmerber's warrant requirement should not apply unless the police penetrate a person's rectum. That does not present a compelling reason for granting certiorari either. There is no conflict in the law for this Court to resolve. The "conflict" imagined by the State involves a handful of cases, which either do not directly address the issue or are from intermediate appellate state courts. In any event, the New York Court of Appeals correctly decided the issue.

REASONS FOR DENYING THE WRIT

I. THE STATE WON ON THE ISSUE WHICH IT ASKS THIS COURT TO REVIEW. FURTHER, THERE IS NO CONFLICT THIS COURT NEEDS TO RESOLVE REGARDING THE CONSTITUTIONALITY OF WARRANTLESS STRIP AND VISUAL BODY CAVITY SEARCHES CONDUCTED INCIDENT TO ARREST, OR THE APPROPRIATE STANDARD THAT APPLIES TO SUCH SEARCHES.

At the outset of its petition, the State asserts that because the Court has reserved the question of whether a strip search or visual body cavity search is permissible incident to a lawful arrest, the Court should grant certiorari to resolve this constitutional question. (Petition for a Writ of Certiorari ["State Pet."] at 3). However, initially, there is no dispute between the parties as to the propriety of warrantless strip searches incident to arrest. Respondent has never argued that the police must obtain a warrant before requiring the arrestee to disrobe to permit a visual inspection of the person's body.[2] As for the constitutionality of visual body cavity searches conducted incident to arrest, the State won on that issue below by a clear majority. Five of the seven judges sitting on the New York Court of Appeals agreed with the State that the authority to conduct a full search incident to arrest also includes the authority to conduct a visual body cavity search. Accordingly, this case is not the proper vehicle for this Court to determine the question of whether a search incident to arrest includes strip or visual body cavity searches of arrestees.

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[2] All seven judges agreed that a warrantless strip search may be conducted on reasonable suspicion to believe that the arrestee is concealing evidence underneath clothing (State App. at 11a, 15a).

The State nonetheless claims that "federal and state courts have sharply splintered" over whether arrestees can be subjected to "a strip and visual body cavity search just to prevent the concealment and potential destruction of evidence." (State Pet. at 15). This claimed divide, the State asserts, "highlight[s]. . . that the guidance of this Court is urgently needed." (State Pet. at 23). However, there is virtually no conflict among the state and federal courts regarding the propriety of such searches.

Notwithstanding respondent's belief that a warrant should be required for visual body cavity searches, the overwhelming majority of the state and federal courts — the "vast" majority in the State's prior words — including now the New York Court of Appeals, have held that strip and visual body cavity searches may be conducted incident to arrest without the necessity of a warrant.[3] The New York Court of Appeals found "considerable judicial consensus" on this issue (State App. at 5a). Indeed, as the State acknowledges, only a single Ninth Circuit case and a few intermediate state appellate court decisions from Virginia have reached the opposite conclusion (State Pet. at 20). Of course, the state supreme court of Virginia may eventually decide the issue consistently with the majority of

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[3] See, e.g., Archuleta v. Wagner, 523 F.3d 1278 (10th Cir. 2008); Richmond v. City of Brooklyn, 490 F.3d 1002 (8th Cir. 2007); United States v. Williams, 477 F.3d 974 (8th Cir. 2007); Campbell v. Miller, 199 F.3d 711 (7th Cir. 2007); United States v. Cofield, 391 F.3d 334 (1st Cir. 2004); United States v. Dorlouis, 107 F.3d 248 (4th Cir. 1997); Justice v. Peachtree City, 961 F.2d 188 (11 Cir. 1992); Harden v. Flowers, 2003 U.S. Dist. Lexis 7213 (N.D. Ill. 2003)(unpublished decision); State v. Hall, 10 N.Y.3d 303 (N.Y. 2008); Paulino v. Maryland, 399 Md. 341, cert. denied 128 S.Ct. 709 (2007); State v. Jenkins, 82 Conn. App. 111 (Conn. Ct. App. 2004); McGee v. State, 105 S.W.3d 609 (Tex. Crim. App.), cert. denied 540 U.S. 1004 (2003), rehearing denied, 540 U.S. 1143 (2004); Delaware v. Doleman, 1995 Del. Super. LEXIS 235 (Del. Super. Ct. 1995)(unpublished opinion).

jurisdictions, eliminating even that jurisdiction from the tiny opposing camp.

Accordingly, there is no conflict among the lower courts for this Court to resolve. To the contrary, New York has followed the clear majority of the courts that have addressed this issue in finding that warrantless visual body cavity searches may be conducted.[4]

Another reason that the State advances for granting certiorari is the perceived need for the Court to settle "which legal standard" applies to assessing the constitutionality of warrantless visual body cavity searches incident to arrest (State Pet. at 19). According to the State, while the "the majority of jurisdictions" have "embraced the . . . reasonable suspicion standard," "some courts" have applied the four-part reasonableness test set forth in Bell v. Wolfish, and one court has applied a probable cause standard (State Pet. at 16-19). The State also finds it troubling that those courts adopting a reasonable suspicion standard have arrived at the standard via different reasoning (State Pet. at 18-19).

Initially, this case is the wrong vehicle for resolving any issue concerning the correct standard. The New York Court of Appeals adopted the reasonable suspicion standard. The State never claimed that the reasonable suspicion standard was

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[4] The State cites a "split" among legal scholars as further evidencing the need for review by this Court (State Pet. at 22). However, a range of opinion in the academic community does not require resolution by this Court when the lower courts themselves are not divided. Notably, one of the more recent law review articles cited by the State is premised on the recognition that the federal circuits, with the exception only of the Ninth Circuit, have been unanimous in permitting warrantless visual body cavity searches incident to arrest upon a showing of particularized facts. See Eugene Shapiro, Strip Searches Incident to Arrest: Calming the Authority to Humiliate, 83 N.Dak. L. Rev. 67, 67 (2007).

improper or incorrect. In fact, the State acknowledged widespread acceptance of this standard among federal and state courts, and argued that the circumstances of respondent's case satisfied its demands. It may well be that the State would prefer some other standard to apply to such searches. However, the State is not aggrieved by New York's adoption of a standard that the State itself endorsed, and the State should not be afforded another bite at the apple to advocate for a different standard nationwide.

In any event, the "significant confusion" that the State claims exists is illusory. As the State acknowledges, the First, Seventh, Eighth, Tenth and Eleventh Circuits and the state courts of Maryland, Delaware, Connecticut and New York have embraced the reasonable suspicion standard. Although the State endeavors to portray a conflict-riven nation by casting Bell's "reasonableness" test as qualitatively different (State Pet. at 16-17), the practical reality is that courts applying Bell to visual body cavity searches of arrestees have also incorporated a requirement of particularized suspicion, either expressly or through application of the Bell factor that considers the "justification for initiating the search." See, e.g., Cofield, 391 F.3d at 336-38; Campbell, 499 F.3d at 718; Swain v. Spinney, 117 F.3d 1, 5 (1st Cir. 1997); Weber v. Dell, 804 F.2d 796, 802 (2d Cir. 1986), cert. denied sub nom. County of Monroe v. Weber, 483 U.S. 1020 (1987); Stewart v. Lubbock County, Texas, 767 F.2d 153, 156-57 (5th Cir. 1985), cert denied 475 U.S. 1066 (1986); Mary Beth G. V. City of Chicago, 723 F.2d 1263, 1273 (7th Cir. 1983); State v. Jenkins, 842 A.2d 1148, 1157-58 (Conn. App. Ct. 2004); McGee, 105 S.W.3d at 616-17;

Commonwealth v. Thomas, 708 N.E.2d 669, 672-74 (Mass. 1999).

Indeed, each of the four cases the State offers as examples where courts "simply analyzed the propriety of such searches under Bell's four-part reasonableness test" (State Pet. at 16), also assessed the particular suspicion the police possessed to believe that the defendant was concealing weapons or contraband. See United States v. Williams, 477 F.3d 974, 975 (8th Cir. 8th Cir. 2007)("There is no question that the police were justified in searching inside Williams's pants. The police possessed a warrant authorizing them to search his person for drugs and firearms, and an initial pat-down produced specific probable cause that Williams was hiding something inside his pants."); Cofield, 391 F.3d at 336-37 (citing circumstances giving police "good reason" to believe that weapons and narcotics might be hidden in defendant's underwear); Justice v. Peachtree City, 961 F.2d 188, 193 (11th Cir. 1992)(holding that strip searches require "reasonable suspicion to believe that the [defendant] is concealing weapons or contraband"); McGee, 105 S.W.3d at 617 (where, inter alia, citizen-informant advised police officer that defendant was hiding crack cocaine between his buttocks, court finds "from the totality of the circumstances that [the officer] had sufficient justification to believe that a search was necessary").

Thus, courts applying the Bell test would not have reached a different conclusion upon applying a reasonable suspicion test. Certainly, that is true in respondent's case, where the intermediate appellate court, in applying the Bell factors, relied on the same facts in finding both that the search was justified under

Bell and that the police had reasonable suspicion (State App. 42a-43a). Certiorari, therefore, is not merited because a decision regarding the "correct" standard would lack any practical significance.

In summary, there is no compelling reason to grant certiorari to the State, the prevailing party on the primary issue on which it now seeks certiorari. Further, there is no conflict that needs to be resolved by this Court. The lower courts agree with virtual unanimity that warrantless visual body cavity searches may be conducted incident to arrest. Further, this Court does not need to resolve which standard should be applied. The majority of courts have consistently applied the standard adopted by the New York Court of Appeals, reasonable suspicion to believe that the arrestee is concealing a weapon or contraband. To the extent that some courts rely more directly on Bell v. Wolfish's factors, those courts still require particularized facts in assessing the justification for the search, so that choosing one standard over the other would not change the outcome.

II. THE NEW YORK COURT OF APPEALS IS THUS FAR THE ONLY COURT OF LAST RESORT TO DIRECTLY HOLD THAT THE POLICE MUST OBTAIN A WARRANT BEFORE REMOVING AN ITEM PROTRUDING FROM BUT CONCEALED WITHIN A DEFENDANT'S RECTUM.

Pursuant to Schmerber and its own prior decision in People v. More, the New York Court of Appeals held in respondent's case that, absent exigent circumstances, the police must obtain a warrant before removing a protruding but concealed item from the body cavity of an arrestee. The State maintains that this holding must be reviewed because "[c]ourts nationwide" have "split" on the question of whether the

removal of a concealed but protruding item requires a warrant under Schmerber (State Pet. at 28).

The State exaggerates the state of the law on this narrow issue. At present, the New York Court of Appeals is the only state high court to have squarely addressed the issue. There is no nationwide split, or anything close. The State cites a handful of cases supposedly standing in opposition to the New York Court of Appeals' holding (State Pet. at 31-32), but those cases present no conflict.

The State cites State v. Himmelwright, 551 F.2d 991 (5th Cir. 1977) and United States v. Holtz, 479 F.2d 89 (9th Cir. 1973) — both border search cases — as supporting the proposition that "as long as the police do not penetrate the surface of the skin, Schmerber does not apply." (State Pet. at 31). However, initially, neither case decided what standard applies to the removal of a protruding object; instead, both cases concerned the constitutionality of the visual inspection of the suspect's vagina that led to the discovery of the protruding item. Himmelwright, 551 F.2d at 995-96; Holtz, 479 F.2d at 93. Further, both cases involved border searches, and therefore, to the extent Holtz also inferentially approved the seizure of the condom protruding from the suspect's vagina, the case is not apposite because of the diminished expectation of privacy that defendants have at a border. See United States v. Montoya de Hernandez, 473 U.S. 531, 539 (1985).

The State also cites State v. Nieves, 383 Md. 573 (Md. 2004). But that case, while finding that a strip search took place when the search produced two baggies that were protruding from the defendant's rectum, did not directly address the

issue, perhaps because of the undeveloped state of the record. The intermediate state appellate court decision explained that there was "no evidence" in the record, "[a]side from the obvious removal of the appellant's clothing . . . as to how the strip search was conducted," State v. Nieves, 160 Md. App. 647, 662, fn.2 (Md. App. 2004), and specifically noted as an open question whether "any touching [was] involved in this procedure." Id. at 662. Even assuming the drugs were actually concealed inside a body cavity, rather than protruding from the buttock cheeks, the record fails to reveal how the drugs were recovered, and, specifically, whether the police, or the defendant himself, removed them. It is therefore unsurprising that the Court of Appeals found on the basis of this undeveloped record, that "it appears that a strip search was conducted rather than a physical body cavity search." Nieves, 383 Md. at 586.[5]

The State also cites intermediate state appellate court decisions from Washington, Ohio and Virginia (State Pet. at 32), but those provide no basis for finding a conflict as the state high courts have not passed on the issue, and may ultimately decide it differently.

Accordingly, there is no conflict in the law for this Court to resolve regarding the need for the police to obtain a warrant before removing a protruding object

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[5] State v. Voichahoske, 271 Neb. 64 (Neb. 2006), cited by the State, also fails to advance the State's claim of conflict, as the question of whether the police conducted a body cavity search was never before the court. While the court recounted that the police saw a bag of powder protruding from the defendant's rectum after he was made to bend over, the defendant did not claim that he was subjected to a body cavity search, and complained only that the evidence stemming from his "strip search" should have been suppressed. The State itself is forced to acknowledge that Voichahoske does not "directly confront[]" the issue (State Pet. at 32).

concealed within a body cavity. Only a handful of cases have any bearing on the issue. Virtually no state high court aside from the New York Court of Appeals has directly addressed the issue, and the two federal Court of Appeals decisions cited by the State are inapt and distinguishable.

III. THERE IS NO DISPUTE BETWEEN THE PARTIES CONCERNING SCHMERBER'S APPLICABILITY TO BODY CAVITY SEARCHES, AND THE NEW YORK COURT OF APPEALS CORRECTLY DECIDED THE NARROW QUESTION OF WHETHER REMOVING AN ITEM CONCEALED WITHIN A BODY CAVITY BUT PROTRUDING FROM IT CONSTITUTES SUCH A SEARCH.

The State does not dispute that, absent exigent circumstances, a warrant is necessary before the police may conduct a body cavity search. The State, however, takes issue with the New York Court of Appeals' holding that removal of a partially protruding item constitutes a body cavity search. The State contends that only penetrations "into the body" implicate Schmerber, and that the Court of Appeals decision "creates a cumbersome legal requirement" of no practical benefit (State Pet. at 34).

The State is wrong. The Court of Appeals' application of Schmerber to the removal of items protruding from body cavities is the correct rule of law. It is consistent with Schmerber's concern for "human dignity and privacy," and, importantly, protects an individual's safety under a wide range of factual possibilities.

The main flaw in the State's reasoning is its casual assumption that whenever the police remove a protruding item, it will be "quick" and "non-invasive,"

presumably because it will involve no "penetration of the body with either a hand or instrument." (State Pet. at 35). But, as the Court of Appeals implicitly recognized, the removal of a protruding item can be every bit as invasive as a search effected by direct penetration. As the underlying facts in People v. More, set forth by the dissent, show, the removal of a protruding item is not necessarily a simple task, and may occasion significant pain (State App. at 31a-32a). Regardless of whether an implement or hand is inserted into the defendant, the "manipulation and removal" of a protruding portion of a bag "necessarily exert[s] force on the portion of the bag extending into [the defendant's] rectum." State v. Barnes, 159 P.3d 589, 591 (Ct. App. Ariz. 2007). Just how much force may depend on a number of variables, but certainly no categorical assumption can be made that the police will accomplish every such extraction "quickly" and "non-invasively." Only a bright-line rule tethering the warrant requirement to the location of the item within a body cavity will ensure that the police do not forcibly and painfully invade another individual's body, without a neutral magistrate first assessing the need for such an invasion and the manner and scope of the search.

Nor is the State correct in its complaint that a warrant creates "a cumbersome legal requirement . . . that creates no benefit even to arrestees," for the warrant will "inevitably be issued," but the arrestee, may, in the meantime, ingest, to his or her detriment, the concealed drug (State Pet. at 34-35).

Requiring a warrant before the police can remove a concealed but protruding item is not a technicality and serves important purposes. This Court has repeatedly

reaffirmed the centrality of the warrant requirement's goals of judicial objectivity and deliberative decision-making. See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 622 (1989)("A warrant . . . provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case."); Johnson v. United States, 333 U.S. 10, 14 (1948)("Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."); Groh v. Ramirez, 540 U.S. 551, 558-59 (2004)("we are not dealing with formalities")(quoting McDonald v. United States, 335 U.S. 451, 455 (1948)).

Putting the matter before the magistrate not only ensures that there is a basis for the search, but also ensures that the search is conducted reasonably — before any damage is done — an equally important consideration under Schmerber, see 384 U.S. at 771-72, and reinforced by the New York Court of Appeals. See State App. at 12a; see also Eugene Shapiro, Strip Searches Incident to Arrest: Cabining the Authority to Humiliate, 83 N.D. L. Rev. 67, 106-107 (2007)("The magistrate's traditional role in determining the reasonable scope and manner of a search would have a tremendous impact in this area. . . . In addition to the need for an objective determination of the authorized scope of a strip search, the value of a judicial determination of the manner in which a search may be executed cannot be overstated"). Where, how, and by whom the search is to be conducted are

matters appropriate to judicial inquiry, and, if found wanting, can be corrected, thus averting potential injury to the defendant, claims of malfeasance or brutality against the police, and suppression of the evidence if the search were ruled unreasonable after a hearing or on appeal. The "importance of informed detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." Schmerber, 384 U.S. at 770. Accordingly, contrary to the State's claim, the warrant requirement in this context serves important purposes, and benefits law enforcement as much as the arrestee.

Finally, as in many states, search warrants can be obtained in New York by telephone application, see Criminal Procedure Law §§ 690.35, 690.36. There is no basis for believing that undue delay will accompany seeking a warrant as to pose a health danger to the arrestee. And nothing in the Court of Appeals' decision bars the police from obtaining the warrant before they undertake the initial strip and visual body cavity search, thus allowing them to proceed without interruption once the search is underway.

In sum, the New York Court of Appeals correctly decided that Schmerber governs removal of an item protruding from a body cavity. The State's Petition utterly fails to raise any issue on this narrow question requiring review by this Court.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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07-1568

In The
SUPREME COURT OF THE UNITED STATES

NEW YORK,

Petitioner,

-versus-

AZIM HALL,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

The State of New York submits this reply brief in support of its petition for a writ of *certiorari*.

ARGUMENT

In a single uninterrupted search, the police brought respondent to the police precinct where they conducted a strip and visual body cavity search of his person. Upon spying a string dangling from his rectum, the police pulled the string, thereby recovering the crack cocaine respondent had stored inside of himself. From this one search, two compelling Fourth Amendment issues worthy of this Court's review are presented. First, whether the police can lawfully conduct warrantless strip and visual body cavity searches incident to arrest, for the purpose of finding and preserving concealed evidence

of the crime, and second, whether by subsequently pulling on a string protruding from respondent's rectum, the police conducted an intrusion into the body requiring a warrant under *Schmerber v. California*, 384 U.S. 757 (1966).

In his brief opposing *certiorari*, respondent does not deny that both issues present a federal question, nor does respondent argue that there are any factual disputes warranting the denial of this petition. Rather, with regards to whether the police lawfully conducted a strip and visual body cavity search incident to arrest, respondent asserts that this case is not the "proper vehicle" for this Court to settle the matter because petitioner (the State) "won on that issue below." Further, while respondent acknowledges that the courts below are divided over this important issue, he attempts to downplay the extent of that conflict. With regard to whether the police lawfully pulled the string that they discovered during the visual body cavity search, respondent contends that there is "no conflict in the law for this Court to resolve" (Opposition Brief: 12-14), and he also argues that the New York Court of Appeals' decision, under the principles espoused in *Schmerber*, was correct (Opposition Brief: 15-18). All of respondent's arguments are unavailing.

1. Respondent concedes that this Court has "reserved the question of whether a strip search or visual body cavity search is permissible incident to a lawful arrest" (Opposition Brief: 6). Nonetheless, respondent asserts that because the "State won on that issue below," in that the New York Court of

Appeals permitted such warrantless searches, this case is not the "proper vehicle" to decide the matter (Opposition Brief 6). Respondent is wrong.

The investigatory search of respondent at the police precinct here was one continuous search that began when he was asked to remove his clothes and ended when the police pulled the string protruding from his rectum. Based upon these facts, the New York Court of Appeals determined that the police acted lawfully up until when they pulled the string. Respondent now attempts to artificially segment the strip and visual body cavity search from the subsequent pulling of the string. But this segmentation is flawed. As this was one continuous and uninterrupted search, this Court will necessarily have to determine whether the initial strip and visual body cavity search, which led to the discovery of the string, was lawful.

Put differently, this is not a situation where the resolution of this issue is irrelevant to the ultimate outcome of the case. *See, e.g., Sommerville v. United States*, 376 U.S. 909 (1964) (*certiorari* denied because resolution of conflict would not have changed result reached below). Nor is this a situation where the petitioner is asking this Court to resolve an issue unessential to the judgment. *See, e.g., Mathias v. WorldCom Techs., Inc.*, 535 U.S. 682 (2002) (*certiorari* dismissed because "petitioners were the prevailing parties below" who were seeking "review of uncongenial findings not essential to the judgment"). Rather, it is clear that to resolve the issue of whether the pulling of the string from

respondent's rectum was an unlawful intrusion into the body, as the New York Court of Appeals held, this Court must first address the issue of whether the steps that led up to the string pull were in themselves lawful.

In the alternative, respondent argues that *certiorari* on this issue should be denied because "there is no conflict among the lower courts for this Court to resolve" (Opposition Brief: 8). Respondent's contention is puzzling considering that both the majority and the concurrence of the New York Court of Appeals here acknowledged that a sharp split exists between jurisdictions that require a warrant for investigatory strip and visual body cavity searches incident to arrest -- the Ninth Circuit Court of Appeals and the State of Virginia -- and the majority of jurisdictions that do not (App. 7a, 18a-20a; Petition: 15-20). And indeed, in respondent's briefs to the New York Court of Appeals, where he argued that he had been subject to an unlawful warrantless visual body cavity search incident to his arrest, he relied on those very same Ninth Circuit and Virginia cases that he now claims form a "tiny opposing camp" (Opposition Brief: 8).[1]

Moreover, there is nothing to suggest that the cases from the Ninth Circuit and Virginia are not good law. In fact, recent decisions from a federal district court within the Ninth Circuit as well as a

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[1] See pages 33-35 of respondent's brief to the New York Court of Appeals, which can be provided upon request.

Virginia appellate court, both of which required a warrant for an investigatory visual body cavity search of an arrestee, demonstrate otherwise. *See Burton v. Spokane*, 2007 U.S. Dist. LEXIS 42101 (E. D. Wash. 2007) (*citing Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1449 [9th Cir. 1991]); *King v. Commonwealth*, 49 Va. App. 717 (Va. Ct. App. 2007); *see also* Eugene Shapiro, *Strip Searches Incident to Arrest: Cabining the Authority to Humiliate*, 83 N. Dak. L. Rev. 67, 99-105 (2007) (acknowledging split between the Ninth Circuit and the rest of the Federal Circuits). Thus, there is absolutely no question that on the question specifically reserved by this Court in *Illinois v. Lafayette*, 462 U.S. 640, 646 n.2 (1982) (Petition: 12), the Circuits and States are split as to whether a warrant is required, and therefore, *certiorari* should be granted to resolve this important issue. *See, e.g., Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 340 (2005) (*certiorari* granted in securities fraud case because the "Ninth Circuit's views about loss causation differ from those of other circuits that have considered this issue).[2]

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[2] Of course, the need to resolve this split is especially pressing because, as explained on page 24 of the petition, there is a direct conflict between the state courts of Virginia and the Fourth Circuit Court of Appeals, which has jurisdiction over that state. *See, e.g., Johnson v. California*, 545 U.S. 162, 164 (2005) (*certiorari* granted where California state courts and Ninth Circuit Court of Appeals have provided "conflicting answers" to a *Batson* question, because "both of those courts regularly review the validity of convictions obtained in California criminal trials"). Likewise, while both jurisdictions do not require a search warrant, the Supreme Court of

(Continued...)

Lastly, with regard to the jurisdictions that permit warrantless strip and visual body cavity searches of arrestees to discover evidence, respondent argues that there is no discernable difference between those courts that follow the four-factor *Bell v. Wolfish* test and those that apply the "reasonable suspicion" standard (Opposition Brief: 9-11). Rather, respondent contends, both tests require a "particularized suspicion" that a suspect is secreting contraband before a strip or visual body cavity search is allowed (Opposition Brief: 10). Thus, respondent concludes, *certiorari* is not warranted because a "decision regarding the 'correct' standard would lack any practical significance" (Opposition Brief: 10).

The relevant case law, however, proves otherwise. For example, while the majority of jurisdictions that permit warrantless visual body cavity searches of arrestees have settled on the "reasonable suspicion" standard (Petition: 18), the Supreme Court of Massachusetts in *Thomas*, 429 Mass. at 408-09, held that under the *Bell* balancing test, probable cause that the arrestee was secreting contraband was required before the police could conduct a warrantless visual body cavity search

(...Continued)
Massachusetts requires that the police have probable cause to believe that an arrestee is secreting contraband, while the First Circuit Court of Appeals, which has jurisdiction over that state, requires only reasonable suspicion. *Compare Commonwealth v. Thomas*, 429 Mass. 403 (1999), *with United States v. Barnes*, 506 F.3d 58, 62 (1st Cir. 2007).

(Petition: 17-18). *See also Evans v. Stephens*, 407 F.3d 1272, 1279-80 (11th Cir. 2005) (while ruling that "reasonable suspicion" was the minimum level of suspicion required, opined that actual standard may be "higher").

At the other end of the spectrum, Texas' highest court for criminal appeals ruled that under the "justification" prong of *Bell*, the visual body cavity search of the suspect was justified based solely upon the initial probable cause that the suspect was "engaged in illegal activity." *McGee v. State*, 105 S.W.3d 609, 617 (Tex. Crim. App. 2003). No particularized suspicion, other than the probable cause to arrest, was required. *Id.* at 618 (Cochran, J. concurring). Thus, while respondent contends that it is irrelevant as to whether courts apply "reasonable suspicion" or whether they apply the four-factor *Bell* test, obviously, there is a significant, outcome determinative distinction between jurisdictions that require probable cause to believe that contraband has been secreted as opposed to those that require the lesser reasonable suspicion standard as opposed to those that permit such searches simply based on the probable cause of a suspect's arrest.

2. Turning to the second issue presented, whether the removal of a item partially protruding from a body cavity requires a warrant under *Schmerber v. California*, respondent primarily attempts to downplay the split that has roiled this nation's courts, claiming that the "State exaggerates the state of the law on this narrow issue" (Opposition Brief: 12-13).

However, while respondent maintains that this is a very "narrow" issue (Opposition Brief: 12), in actuality, any ruling that clarifies or expands upon *Schmerber* will necessarily impact other similar bodily "intrusions," such as x-rays and DNA tests, where the courts have also split as to whether *Schmerber* applies (Petition: 29-30). Thus, contrary to respondent's contentions, this case could potentially settle many currently unresolved areas of law.

Regardless, even on the allegedly "narrow" issue of whether the removal of an object protruding from a body cavity constitutes an intrusion into the body, as respondent notably concedes, this issue has split the intermediate-appellate courts of a number of states (Opposition Brief: 13). Some of those courts, like the New York Court of Appeals here, have determined that this type of search falls under *Schmerber*, and the police must first obtain a warrant; other courts have determined that *Schmerber* does not apply to this type of search (Petition: 31-32). In response to this split, respondent simply argues that no conflict yet exists because the "state high courts have not passed on the issue" (Opposition Brief: 13). However, until those state high courts rule, the intermediate appellate courts' decisions are the law of that state. Thus, whether or not a state's high court has yet ruled is immaterial as to whether a conflict exists.

But even more important than the split among the aforementioned intermediate-appellate courts, is the fact that two federal circuit courts of

appeals have decided this issue contrary to the New York Court of Appeals' ruling here (Petition: 31). To escape from under this split, respondent attempts to distinguish away the Ninth Circuit's decision in *United States v. Holtz*, 479 F.2d 89 (9th Cir. 1973), and the Fifth Circuit's decision in *State v. Himmelwright*, 551 F.2d 991 (5th Cir. 1977) (Opposition Brief: 12). Respondent's distinctions are unpersuasive.

In *Holtz*, border guards suspected the defendant, who was attempting to enter the United States, of concealing narcotics in her vagina. 479 F.2d at 90-91. She was subjected to a strip search, at the end of which she was asked to bend over and spread her buttocks. *Id.* at 91. Upon her doing so, the guard saw a condom partially hanging from the her vagina; the guard removed the condom and discovered that it was filled with heroin. *Id.* In declining to suppress the evidence, respondent is correct that the court analyzed the strip search aspects of the case under the lowered expectation of privacy at the border (Opposition Brief: 12). Unlike in non-border circumstances, the court did not require that the suspect first be under arrest prior to conducting such a search. *Id.* at 92-94. However, with regard to removing the condom protruding from the defendant's body, the court applied traditional constitutional principles and held that there had been no "invasion and intrusion [as] regulated by ... *Schmerber*." *Id.* at 94. The Ninth Circuit distinguished *Schmerber* and its progeny from the search of the defendant by stating that *Schmerber*

involved an "intrusion into the body," which by implication, did not occur in *Holtz*. *Id.*

An almost identical border search took place in *Himmelwright*, where border guards removed a cocaine-filled condom partially protruding from the suspect's vagina. 551 F.2d at 992-93. Like the Ninth Circuit, the Fifth Circuit held that the lowered expectations of privacy at the border justified a strip search and visual body cavity search based solely upon reasonable suspicion that the suspect was concealing narcotics. *Id.* at 993-95. However, in distinguishing the search performed from a full body-cavity search, the court was careful to point out that the protruding contraband was "discovered in the course of an *exterior* search of the suspect's body." *Id.* at 996. Crucially, "there was no probing search" of the defendant's "orifices," and had the inspector "not seen a protruding object, any further search [into the body] may well have been constitutionally impermissible." *Id.* But, the court concluded, due to the visual nature of this search, "it was reasonable for the customs officers" to "remove the suspicious object from her body." *Id.*

Thus, like the Ninth Circuit in *Holtz*, the Fifth Circuit clearly differentiated, on constitutional grounds and not mere border security concerns, between searches that involved the physical entrance into the suspect's cavities, and those that involved the less-intrusive removal of an object protruding from those cavities. Because the decisions of these two federal circuit courts of appeals, along with the decisions from a number of

states, squarely conflict with the New York Court of Appeals' ruling here, *certiorari* should be granted. *See, e.g., Jones v. Flowers*, 126 S. Ct. 1708, 1713 (2006) (*certiorari* granted "to resolve a conflict among the Circuits and State Supreme Courts"); *Martinez v. Court of Appeal*, 528 U.S. 152, 155 (2000) (*certiorari* granted because petitioner has "raised a question on which both state and federal courts have expressed conflicting views").

Finally, respondent attempts to defend the decision of the New York Court of Appeals on the merits (Opposition Brief: 14-17). But in doing so, respondent does not even assert that by pulling the string protruding from his rectum, the police intruded into his body, which, under *Schmerber*, required a warrant (Opposition Brief: 14). Rather, respondent suggests that the application of *Schmerber* to the "removal of items protruding from body cavities" was correct because it was "consistent with *Schmerber*'s concern for 'human dignity and privacy,' and, importantly, protects an individual's safety under a wide range of factual possibilities" (Opposition Brief: 14). In essence, respondent contends that the broad principles of *Schmerber*, but not necessarily the factual circumstances, apply.

And given the facts here, respondent's failure to argue that the pulling of the string dangling away from his rectum constituted an intrusion into the body under *Schmerber*, is hardly surprising. Crucially, this implicit concession supports petitioner's argument that the "decision of the New York Court of Appeals directly conflicts with the rule

enunciated in *Schmerber*," which is that only police intrusions into the body require a warrant (Petition 33). For this reason alone, this Court should grant *certiorari*. *See, e.g., Bunkley v. Florida*, 538 U.S. 835, 836 (2003) (*certiorari* granted because "Florida Supreme Court contradicted the principles of this Court's decision in *Fiore v. White*); *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 14 (1974) (*certiorari* granted "to decide whether the holding of the Florida Supreme Court was consistent with decisions of this Court").

Regardless, even if this Court does not conclude that there is a direct conflict between this case here and *Schmerber*, this case undoubtedly presents a unique interpretation, and more importantly, a significant extension, of *Schmerber*. For this reason too, *certiorari* should be granted. *See, e.g., Bullington v. Missouri*, 451 U.S. 430, 432 (1981) (*certiorari* granted on the issue of whether reasoning of prior Court precedent also applies to different kind of sentencing procedure); *Oregon v. Mathiason*, 429 U.S. 492, 492 (1977) (*certiorari* granted because state court "has read *Miranda* too broadly").

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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